

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
BRIEF &  
APPENDIX**



**76-1511**

In The  
UNITED STATES COURT OF APPEALS  
For the Second Circuit

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PJS

UNITED STATES OF AMERICA,  
Appellee

v.

CHARLES EDWARD WHITE.  
Appellant

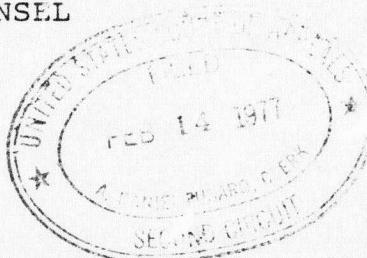
On Appeal From The United States  
District Court For The Western District  
of New York

APPELLANT'S BRIEF & APPENDIX

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January, 1977



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TABLE OF CONTENTS

	<u>Page</u>
Table of Cases . . . . .	ii
Statute Involved . . . . .	v
Questions Presented . . . . .	vi
Preliminary Statement . . . . .	1
Statement of Facts . . . . .	2
Statement of Annette Petty	
Testimony of Michelle Simms . . . . .	3
Testimony of Alice DuBois . . . . .	5
The Other Proof . . . . .	6
Point I - The Hearsay Accusations of Annette Petty Did Not Fall Within Any of the Exception to the Hearsay Rule and the Admission of this Evidence so Prejudiced the Defendant as to Require Reversal of His Conviction.	6
A. Statements not declaration against interest	7
B. Statements not admissible as an "other exception"	11
Point II - The Admission into Evidence of Annette Petty's Accusations Deprived the Defendant of His Sixth Amendment Right to Confront His Accusers. That Deprivation so Prejudiced the Defendant that His Conviction Must be Reversed.	17
Point III - It was Error Requiring Reversal of the Defendant's Conviction for the Trial Court to Refuse to Ask the Jurors Whether They had Read a Prejudicial Newspaper Article Which Appeared During the Trial.	20
Conclusion . . . . .	23

TABLE OF CASES

	<u>Pages</u>
<u>Alford v. United States</u> , 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1930)	18
<u>Bruton v. United States</u> , 391 U.S. 123, 88 S.Ct. 1620, 19 L.Ed.2d 70 (1968)	8, 12, 13
<u>California v. Green</u> , 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 499 (1970)	17
<u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)	7, 10, 12, 18
<u>Douglas v. Alabama</u> , 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965)	19
<u>Dutton v. Evans</u> , 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)	10, 12, 14
<u>Filesi v. United States</u> , 352 F.2d 399 (4th Cir. 1965)	9
<u>Margoles v. United States</u> , 407 F.2d 727 (7th Cir. 1969), <u>cert. denied</u> , 396 U.S. 833	22
<u>Mattox v. United States</u> , 156 U.S. 248, 15 S.Ct. 337, 39 L.Ed. 411 (1895)	17
<u>Park v. Huff</u> , 493 F.2d 931 (5th Cir. 1974) <u>Rev'd en banc</u> 506 F.2d 849, <u>cert. denied</u> 423 U.S. 824	7
<u>Pointer v. Texas</u> , 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)	18
<u>United States v. Concepcion Cuelo</u> , 515 F.2d 160 (1st Cir. 1975)	22
<u>United States v. D'Amato</u> , 493 F.2d 359 (2d Cir. 1974)	7
<u>United States v. Dovico</u> , 380 F.2d 325 (2d Cir. 1967). <u>cert. denied</u> , 389 U.S. 944 (1967)	7, 11
<u>United States v. Edwards</u> , 366 F.2d 853 (2d Cir. 1966), 23 <u>cert. denied</u> 386 U.S. 919	23
<u>United States v. Hankish</u> , 502 F.2d 71 (4th Cir. 1974)	22
<u>United States v. Marguez</u> , 462 F.2d 893 (2d Cir. 1972)	8

Page

<u>United States v. Pomponio</u> , 517 F.2d 460 (4th Cir. 1975), <u>cert. denied</u> 423 U.S. 1015	23
<u>United States v. Puco</u> , 476 F.2d 1099 (2d Cir. 1973)	13
<u>United States v. Spinella</u> , 506 F.2d 426 (5th Cir. 1975), <u>cert. denied</u> , 423 U.S. 917	22

STATUTES CITED

	<u>Page</u>
Fed. Rules Evid. Rule 403	14
Fed. Rules Evid. Rule 801, 28 U.S.C.	6
Fed. Rules Evid. Rule 802, 28 U.S.C.	6
Fed. Rules Evid. Rule 804(b)(3) 28 U.S.C.	6, 7, 8, 11
Fed. Rules Evid. Rule 804(b)(5) 28 U.S.C.	6, 11, 14, 15, 16
New York Criminal Procedure Law §60.50	10

OTHER AUTHORITIES CITED

American Bar Association Standards Relating to Fair Trial and Free Press, §3.5(f) (Approved Draft 1968)	22
House Report No. 93-650, 4 U.S. Code Cong. & Adm. News 7089-90 (1974)	7
Jefferson, "Declarations against Interest: An Exception to the Hearsay Rule," 58 Harv. L. Rev. 1 (1944).	8
Notes of Advisory Committee on Proposed Rules, Note to Rule 804(b)(3), 28 U.S.C.A. 697 (West Publishing Co., 1975).	8
Senate Report No. 93-1277, 4 U.S. Code Cong. & Adm. News 7065 (1974)	11

STATUTES INVOLVED

Rule 804, Federal Rules of Evidence provides in pertinent part:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \*

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

\* \* \*

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

QUESTIONS PRESENTED

1. Whether the admission into evidence of the hearsay accusations of the deceased, Annette Petty, was a violation of the Federal Rules of Evidence so prejudicial to the defendant as to require reversal of his conviction.
2. Whether the admission into evidence of the hearsay accusations of Annette Petty was such a substantial abridgment of the defendant's Sixth Amendment right of confrontation as to require reversal of his conviction.
3. Whether it was reversible error for the trial court to refuse the defendant's request to inquire of the jurors had read a prejudicial newspaper article which appeared during the trial.

PRELIMINARY STATEMENT

The defendant-appellant was indicted in the Western District of New York on October 25th, 1974 for the crimes of interstate transportation of females for the purposes of prostitution, in violation of Title 18 U.S.C., §2421 (Count 1), and endeavoring to influence a witness in violation of Title 18, §1503 (Count 2). On defendant's motion, Count 2 was dismissed on May 17th, 1976. The defendant was tried on Count 1 before the Honorable Charles L. Brieant, Jr., United States District Judge (sitting by designation) and a jury. He was found guilty, and judgment was entered by Judge Brieant on October 28th, 1976 sentencing defendant to imprisonment for three and one-half years. It is from this judgment and sentence that defendant appeals.

STATEMENT OF FACTS

Shortly after midnight on September 20th, 1974, two fifteen year old, Buffalo, New York prostitutes, Annette Petty and Michelle Sims were arrested for prostitution in Erie, Pennsylvania. They gave false names and were eventually freed on bail and returned to Buffalo.

Statement of Annette Petty

On October 1st, 1974, FBI Special Agent, Lester S. Skinner interviewed Annette Petty at Buffalo Police Headquarters. Although Miss Petty was not in custody and although she was not a suspect in any federal crime, Skinner had her sign an Advice Of Rights form (GX5) (A-55, A-56; T:121-2).\* She told him that she and Michelle Sims had been taken to Erie, Pennsylvania in mid-September by Charles White and that while in Erie, she was arrested (A-57, A-58; T:123-4). On October 7th, 1974, agent Skinner again interviewed Miss Petty, this time at her home while her mother was in another room (A-59; T:125). Again Skinner had her sign an Advice Of Rights form (GX6). This time the interview was reduced to writing and signed by Miss Petty (GX7). In relevant part her statement was that she had been born March 19th, 1959, had completed the 9th grade and was literate in English. She had first met Charles White, the defendant, about four months prior to October, 1974 and

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\*References to pages of the Appendix are A-#. References to pages of the Transcript of trial are T:#.

together with Michelle Sims had seen him again in September, 1974. (A-62; T:128). On September 19th, 1974, she, along with Michelle Sims, someone named James and the defendant had gone to Erie in the defendant's brown Buick (A-62, A-63; T:128-9). When they arrived in Erie shortly after midnight, she and Michelle got out of the car. The two girls then waited in that area about fifteen minutes until Michelle Sims successfully solicited a customer and performed an act of prostitution with him. Both girls were then arrested by Erie Police Officers (A-63; T:129).

The defendant was promptly arrested and charged with the interstate transportation of Michelle Sims and Annette Petty in violation of Title 18 U.S.C. Section 2421. During the pendency of that action and prior to the filing of this indictment, Miss Petty was found murdered in a Buffalo area motel. The defendant was promptly indicted not only for the interstate transportation but also for "endeavoring to influence, intimidate, and impede Annette Petty" in violation of Title 18 U.S.C. Section 1503.<sup>1</sup>

Testimony of Michelle Sims

At trial Michelle Sims testified that, at Annette's suggestion, (T:70) she and Annette Petty had been driven to Erie, Pennsylvania in September, 1974, by the defendant (T:60)

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1. The defendant was also indicted in Erie County, New York, for Miss Petty's murder. He was tried before a jury and acquitted. The Attorney General of the United States then declined to authorize further prosecution under Count 2 of this indictment and that Count was dismissed.

who was her pimp (T:59). They rode in the defendant's 1973 tan, two-tone Buick Electra 225; a man named James accompanied them (T:60-1). At this time Michelle was living at 39 Kingsley, Buffalo, New York with Alice DuBois (T:59). Annette Petty, James and the defendant also stayed there at various times (T:60). According to Michelle, Alice DuBois helped Michelle and Annette with their makeup and gave each of them a wig to wear prior to their leaving for Erie (T:61). Annette and Michelle were then picked up at around 9:00 P.M. (T:61) by the defendant and driven to East Utica Street in Buffalo where they picked up James (T:62). Then they drove straight to Erie, Pennsylvania, stopping only for a snack at a truckstop (T:63).

When they got to Erie, both Annette and Michelle got out of the car (T:64). Charles and James drove off someplace, although Michelle expected them to stay in the general area (T:67). Shortly thereafter Michelle "turned a trick" (T:64) and both girls were arrested (T:64). They called Alice DuBois seeking assistance in getting released on bail (T:68-9). A couple of days later, Alice, James and the defendant came down to Erie, bailed them out and brought them back to Buffalo (T:66-67).

Michelle Sims admitted to having told both the FBI and the United States Grand Jury several contradictory stories before settling upon and sticking with her trial testimony. Among other things she admitted to lying under oath after being specifically warned against perjury (T:89-90). She testified that she hadn't really cared whether she told the

truth or not (T:91).

Testimony of Alice DuBois

Alice DuBois testified that in September, 1974, the defendant was her boyfriend and was living with her (T:20). Annette Petty and Michelle Sims, to whom she had been introduced by the defendant, were also living with her (T:21). On September 19th, 1974 at around 7:00 P.M. the defendant told Alice that he would be comming back to get Annette and Michelle at about 9:00 or 9:30 and that Alice should "fix them up" (T:21-2). Alice fixed their faces and hair and the girls got dressed (T:22). After they left with the defendant, Alice did not see Annette and Michelle again that night (T:23). Around 3:00 A.M., according to Alice, the defendant telephoned to say that he thought Annette and Michelle "got busted" (T:24). The defendant, she said, didn't get home until the next afternoon (T:24). It was established, however, that in October, 1974, Alice had told the FBI that the defendant had returned to her apartment at about 1:30 or 2:00 A.M. on September 20th, 1974 (T:148-9).<sup>2</sup>

On Saturday the 21st, Alice, James and the defendant drove to Erie where arrangements apparently were made to effect the girls' release on bail. Then they all returned to

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2. This was significant because it is 90 miles from Buffalo to Erie. Since the trip takes about 2 hours one way, it would be difficult for the defendant to have made the round trip and cruised around Erie in the manner contended by the Government and still have arrived back in Buffalo by 1:30 or 2:00 A.M. Apparently the trip down to Erie took close to 3 hours.

Buffalo (T:26-8).

Alice DuBois admitted that in October, 1974, she had learned that her lover, the defendant, intended to marry another woman (T:35).

The Other Proof

The balance of the government's proof consisted of the testimony of Erie Police Officer DiPaolo which established Michelle Sims' act of prostitution and the arrest of her and Annette Petty and also the testimony of agent Skinner relating (over defendant's objection) (A-38 - A-52; T:104-118) the previously described statements of Annette Petty.

The defendant attacked the credibility of Michelle Sims, Alice DuBois and Annette Petty but did not offer other proof.

POINT I

THE HEARSAY ACCUSATIONS OF ANNETTE PETTY DID NOT FALL WITHIN ANY OF THE EXCEPTION TO THE HEARSAY RULE AND THE ADMISSION OF THIS EVIDENCE SO PREJUDICED THE DEFENDANT AS TO REQUIRE REVERSAL OF HIS CONVICTION.

The government conceded at trial and the court below ruled that the statements of Annette Petty were hearsay. Fed. Rules Evid. Rule 801, 28 U.S.C. They are not admissible, therefore, except as provided by rule or statute. Fed. Rules Evid. Rule 802, 28 U.S.C. The court and the government relied upon two such rules: The penal interest exception of Rule 804(b)(3) and the catch-al provision of Rule 804(b)(5). The defendant contends that neither exception was properly

applicable to these statements and that the error of admitting the statements into evidence so seriously prejudiced the defendant as to require reversal of his conviction.

(A) Statements Not Declarations Against Interest

Not every out-of-court statement arguably against the declarant's pecuniary, proprietary or penal interest is admissible as an exception to the hearsay rule. Only those statements which, when made, were so far against the declarant's interests that a reasonable man would not have made them unless he believed them to be true are admissible. Fed. Rules Evid. 804, (b) (3), 28 U.S.C. The obvious reason for the inclusion of the "reasonable man" test is that not every statement against interest has sufficient guarantees of reliability. See House Report No. 93-650, 4 U.S. Code Cong. & Adm. News 7089, 7090 (1974). The purpose of this and other articulations of the test of admissibility is to aid in the "search for trustworthiness and accuracy." Park v. Huff, 493 F.2d 923, 931 (5th Cir. 1974), rev'd en banc, 506 F.2d 849 (1975), cert. denied 423 U.S. 824. The statement cannot be viewed from the vantage point of a mythical, average, reasonable adult. Rather the investigation must turn on a close analysis of what was reasonable to Annette Petty under the circumstances in which the statements were made. See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L. Ed.2d 297 (1973); compare United States v. Dovico, 380 F.2d 325 (2d Cir. 1967), cert. denied, 389 U.S. 944 (1967) with United States v. D'Amato, 493 F.2d 359 (2d Cir. 1974). "[I]t is not the fact that the

declaration is against interest but the awareness of the fact by the declarant which gives the statement significance."

Jefferson, "Declarations against Interest: An Exception To The Hearsay Rule," 58 Harv. L. Rev. 1, 17 (1944).

The available evidence about Miss Petty and the circumstances under which she gave these statements does not support a belief that they are trustworthy and accurate. She was a fifteen year old prostitute with limited schooling. Although the record is otherwise silent about her, these circumstances do not auger well for her emotional stability. Her embrace of a profession grounded in avarice and deceit does not speak well for her truthfulness. When she gave these statements to agent Skinner he had made it clear to her that she was not in any trouble as far as any federal violations were concerned (A-65, A-66; T:131-2). She was his witness, not a prospective defendant, and she knew it, the Advice of Rights forms notwithstanding.

Not only had she no reason to believe that she might be incriminating herself, but she had every reason to believe that she had virtual immunity from prosecution because of her status as a key government witness. The entire thrust of her statements was accusation not self-incrimination. It is well recognized that such statements frequently are not reliable and "may well be motivated by a desire to curry favor with the authorities. . ." Notes of Advisory Committee on Proposed Rules, note to Rule 804(b)(3), 28 U.S.C.A. 697 (West Publishing Co., 1975); see Bruton v. United States, 391 U.S. 123, 141-2, 88 S.Ct. 1620, 19 L.Ed.2d 70 (1961, (White, J., dissenting)).

Even though some of her statements might have been technically against her penal interest, there is nothing in this record to show that she regarded them as such. She had no more reason to be truthful in making these statements than any other accuser. There is no more reason to admit her hearsay statement than would apply to the statement of any other accuser. Cf. Filesi v. United States, 352 F.2d 339 (4th Cir. 1965).

In any event, most of Annette Petty's statements are not against her penal interest at all. The trial court relied upon Miss Petty's admission of a purse snatching to justify his conclusion that the statements were against her penal interest. That portion of her statement, however, was quite properly excluded from evidence. By excluding portions of the statements the trial court acknowledged what this court has already declared, namely that such statements are severable and each portion must be judged independently to determine whether it is against the declarant's interest. United States v. Marguez, 462 F.2d 893 (2d Cir. 1972). In Marguez the declarant, immediately after he and his co-defendants were arrested, said, "Cocaine mine, other guys had nothing to do with it." id. at 894. In analyzing the admissibility of these statements, proffered under the penal interest exception, this court found that the "cocaine mine" portion was against the declarant's penal interest, while the "other guys" portion was not. Each statement, therefore, was subjected to separate analysis. The exclusion of the "cocaine mine" statement was held to be error (although harmless under the circumstances). The exclusion of

the "other guys" portion, however, was held to be correct, since that did not incriminate the declarant. In this case the import of Miss Petty's statements was that she and Michelle had been driven to Erie by the defendant and that, while in Erie, Michelle, but not Annette, committed prostitution and both girls were arrested. None of the conduct to which Miss Petty admits in a redacted statement (GX7) is criminal. She did not commit prostitution herself; she did not help Miss Sims prostitute herself; she does not speak of her own intentions. The statement is damning evidence against the defendant but no evidence at all against Miss Petty.

Even if those statements excluded by the trial court (e.g., the admission of purse snatching) were to be considered, their weight as statements against her interest is greatly diminished by the New York rule in regard to uncorroborated confessions.

A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed.

New York Criminal Procedure Law, §60.50.

The high degree of unlikelihood that Miss Petty's admissions could ever be corroborated certainly removes them from the category of third party admissions deemed reliable by the courts. See, e.g., Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (statements "in a very real sense self-incriminatory and unquestionably against interest.") (emphasis supplied); Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (statement "spontaneous" and "against

his penal interest"); United States v. Dovico, 380 F.2d 325 (2d Cir. 1967), cert. denied, 389 U.S. 944 (1967) (must at least admit a crime for which "prosecution is possible at the time").

For these reasons the hearsay statements of Annette Petty were not admissible under the exception of the hearsay rule created by Rule 804(b)(3) of the Federal Rules of Evidence.

(B) Statements Not Admissible As An "Other Exception."

When Congress was considering the proposed Federal Rules of Evidence there was a division of opinion between the House and the Senate as to whether there should be a catch-all exception to the hearsay rule. The Conference Committee adopted the present Rule 804(b)(5) for the reason, inter alia, that the enumerated exceptions "may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make it clear that it should be heard and considered by the trier of fact." Senate Report No. 93-1277, 4 U.S. Code Cong. & Adm. News 7065 (1974). The purpose of the rule, therefore, was to prevent those injustices that arise out of procrustean rules; it was not intended to dilute the requirements of trustworthiness and accuracy. To that end it was made a condition of admissibility that the proffered statement have circumstantial guarantees of trustworthiness equivalent to those possessed by the enumerated exceptions. Fed. Rules Evid. 804(b)(5), 28 U.S.C. The defendant contends that the hearsay statements of Annette

Petty do not possess such guarantees.

Both this court and the United States Supreme Court have had occasion to discuss, in particular situations, the nature of "indicia of reliability." In Chambers v. Mississippi, supra the Court noted that each statement was made spontaneously to close acquaintances of the declarant shortly after the event described, that each statement was corroborated by some other evidence in the case, and that each was in a very real sense self-incriminatory and unquestionably against interest.

In Dutton v. Evans, supra the Court relied upon the totality of these factors: (1) the statement in question, because it did not expressly assert a past fact, warned the jury against giving it undue weight, (2) the declarant's personal knowledge of the truth or falsity of his statement was "abundantly established," (3) it was extremely remote that the declarant's recollection would have been faulty and (4) the declarant had no reason to lie to his fellow prisoner (the witness) and his statement was spontaneous and against his penal interest.

When, in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 19 L.Ed.2d 70 (1968), the court considered the severance problem caused by the admission of a co-defendant's accusatory statement, it had this to say about the reliability of such statements:

their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully, given the

recognized motivation to shift blame onto others.

391 U.S. at 135-6.

Moreover both Mr. Justice Stewart in his concurring opinion and Mr. Justice White in his dissent agreed that such statements are not at all reliable.

When this court considered the reliability of the statement of a co-conspirator in United States v. Puco, 476 F.2d 1099 (2d Cir. 1973) the court looked chiefly to two circumstances: first, the statements were made during the course of the narcotic sale at a time when the defendant thought he was talking to a fellow criminal; secondly, the accuracy of the statements was immediately thereafter demonstrated by the actions of the defendant himself.

Other examples of the same sort are available but these are sufficient to demonstrate that the hearsay statements of Annette Petty did not possess those indicia of reliability required by the rule. Miss Petty's statements were not made spontaneously nor were they made contemporaneously with the events. They were not clearly against her interest. They did make express assertions of past facts. Miss Petty may have had any numbers of reasons to lie to Skinner. In fact, the court warned the jury that her credibility was suspect because of the likelihood that she was an accomplice and the government agreed that that was a proper charge under the circumstances (T:169). The corroboration of her story by Michelle Sims was after the fact (unlike the situation in Puco, supra) and was

seriously diluted, if not demolished, by her prior contradictory testimony. Similarly such corroboration as flowed from the testimony of Alice DuBois was rendered suspect by her contradictions and her motive to injure the defendant. There was ample opportunity for Annette to enlist Alice in her scheme, if such it was; prior to going to the FBI with her accusations. Her statements were not under oath nor was she told that it was a crime for an adult to lie to agent Skinner. It is unlikely that she even knew there was such a crime.

Although the statements were material as required by subparagraph (A) of Rule 804(b)(5), their materiality was substantially outweighed by the unfair prejudice to the defendant. On that basis alone the statements should have been excluded. Fed. Rules Evid. Rule 403, 28 U.S.C. The prejudiced to the defendant is clear, since his sole defense was to attack the credibility of Sims and DuBois. There was ample basis for the jury to conclude that each of them lied when they tied the defendant to this crime. Any evidence, therefore, which tended to corroborate their story was "crucial" and "devastating" within the meaning of Dutton v. Evans, supra, 400 U.S. at 87. The unfairness of using Annette Petty's statements to bolster the Government's case is amply demonstrated by the following:

1. The defendant could not cross-examine her.
2. Because she was dead it was not only difficult but also dangerous to impugn her motives and her character.

It is ill advised to speak badly of the dead. When the deceased is a young girl the danger increases exponentially.

3. The use of her statement or discussion of her relationship with the defendant dramatically increased the likelihood that the jurors would recall the murder charges against the defendant and hold those against him as well.

The statements were not more probative than other evidence reasonably available to the Government as required by subparagraph (B) of Rule 804(b)(5). The testimony of Michelle Sims was every bit as complete as Annette Petty's statements were insofar as the narrative account is concerned. To corroborate Michelle Sims the Government actually offered the testimony of Alice DuBois and Officer DiPaolo. They could easily have brought in the bail records from Erie and the sureties to corroborate Michelle's claim that the defendant bailed her out. They had announced that James Garret (presumably the ubiquitous James of the trips to Erie) would be a witness. He had testified before the grand jury and, if he testified at trial according to the government's expectations, would have corroborated Michelle Sims on all the pertinent details of who drove to Erie and why.<sup>3</sup>

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3. After summations the prosecutor told the court that agent Skinner had tried unsuccessfully for a week to subpoena Garret. As a matter of fact (although not in the record) the defendant had previously told his attorney that he had seen Garret in the courthouse on the very day most of the evidence was received. Evidently the prosecutor was ignorant of Garret's presence. There was no evidence as to the steps taken by Skinner to serve the subpoena or to show that Garret was not living at his usual address, working at his usual job and frequenting his usual haunts. Nor did the Government complain of this difficulty at a time when examination into those questions could have advanced the trial. The critical ruling had already been made and the testimony had been received (T:170-1).

With this evidence reasonably available, in addition to the other evidence in the case, the hearsay did not meet the standard of the rule. It was not only unfairly prejudicial hearsay, it was unnecessary.

Finally, the rule requires the proponent of such hearsay to notify his opponent in sufficient time for the opponent to prepare to meet it. In this case the government knew of Miss Petty's statement and her death from the outset. Rule 804(b)(5) went into effect January 2nd, 1975. Ten times during the following twenty-two months the case was before the courts for status reports. There were additional appearances for a hearing and there was other activity. Finally, October 5th, 1976, was set as the trial date. On the morning of October 5th, the trial was put over to October 12th. Despite all of this time to prepare, it was not until the late afternoon of October 5th that the Government filed and served its Notice of Intention. At that point it was much too late for the defendant to change his trial strategy and go back in time two years to find the evidence of Annette Petty's malice toward the defendant. Until that moment there had been no suggestion of the slightest need for such preparation. Consequently it had not been done, nor could it be done at such a late date and in such a short time.

The admission of the hearsay was unnecessary; it was not justified by the rules, and it seriously prejudiced the defendant. Error of this magnitude requires reversal of the defendant's conviction and entitles him to a new trial.

POINT II

THE ADMISSION INTO EVIDENCE OF ANNETTE PETTY'S ACCUSATIONS DEPRIVED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS. THAT DEPRIVATION SO PREJUDICED THE DEFENDANT THAT HIS CONVICTION MUST BE REVERSED.

Since the hearsay rule and the Confrontation clause are not co-extensive, even if this court should find Miss Petty's statement admissible under the Federal Rules of Evidence, that does not mean that there was not a serious violation of the defendant's Sixth Amendment rights.

California v. Green, 399 U.S. 149, 155, 90 S.Ct. 1930, 26 L.Ed.2d 409 (1970). "We have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." Id., 399 U.S. at 155. While not every hearsay statement admitted against the accused in the criminal trial results in a confrontation clause violation, the defendant maintains that in his case the violation is clear.

To begin with it is rare to find a case which comes as close as this case does to recreating the precise evil which the Confrontation clause was designed to prevent, namely, trial by affidavit. California v. Green, supra, 399 U.S. at 156; Mattox v. United States, 156 U.S. 242, 15 S.Ct. 337, 39 L.Ed. 411 (1895). A full two weeks after the termination of the Erie trip, Annette Petty went to the police to accuse Charles White of being her pimp. She had had time to concoct the story and to obtain assistance in corroborating it. When she gave her statement to the authorities it was attached to

the complaint which formed the basis for the arrest warrant issued against the defendant. It is difficult to imagine how anyone could fit more precisely into the role of witness against the defendant as that as comprehended by the Confrontation clause. She was not just any witness; she was the finger-pointing instigator of the prosecution.

There are three principle advantages of confrontation: the testimony will be under oath, the witness must submit to cross-examination, and the jury can observe the witness's demeanor. California v. Green, supra. The defendant was denied the benefit of every one of those advantages. The loss of each was crushing to the defendant. None more so than the loss of cross-examination which is "one of the safeguards essential to a fair trial." Alford v. United States, 282 U.S. 687, 692, 51 S.Ct. 218, 75 L.Ed. 624 (1930) and an integral part of a defendant's Confrontation clause rights. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. E.g., Mancusi v. Stubbs, 408 U.S. 204 (1972). But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process and requires that the competing interest be closely examined. Berger v. California, 393 U.S. 314, 315 (1969).

Chambers v. Mississippi, supra, 410 U.S. at 295.

It is difficult to imagine what the "competing interests" could be in this case. Let alone how they could be of such magnitude as to warrant snatching from the defendant his most effective tool for uncovering the truth. Moreover

the counterveiling safeguards that have in other cases protected the defendant from the full effect of the loss of cross-examination are not present here.<sup>4</sup> The absence of indicia of reliability from the statements of Annette Petty has already been thoroughly discussed in Point I, supra. Those arguments are just as applicable here and need not be repeated.

This was not an overwhelming case only slightly tainted by peripheral hearsay. This was a very close case in which the credibility of the government's two principal witness was under serious attack. To shore them up and save the situation the Government threw in the unsworn testimony of an unreachable witness. The defendant's situation at that time became hopeless. He couldn't substitute cross-examination of agent Skinner for cross-examination of Miss Petty.

Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). He was as neatly skewered by the unreachable witness as any victim of Star Chamber ever was. He deserves a new trial.

---

4. E.g., Dutton v. Evans, supra, (hearsay a minor part of an overwhelming case and numerous indicia of reliability); Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972) (cross-examination at prior trial and indicia of reliability).

POINT III

IT WAS ERROR REQUIRING REVERSAL OF THE DEFENDANT'S CONVICTION FOR THE TRIAL COURT TO REFUSE TO ASK THE JURORS WHETHER THEY HAD READ A PREJUDICIAL NEWSPAPER ARTICLE WHICH APPEARED DURING THE TRIAL.

When Annette Petty's death was discovered and for sometime thereafter there was widespread publicity throughout the Western District of New York connecting the defendant with the deceased and the deceased with teenaged prostitution. That publicity was revived when the defendant was tried for Miss Petty's murder in February, 1976. At the trial of this action the defendant was very concerned about the possibility of being prejudiced by some juror recalling the adverse publicity. (Cf. Defendant's motion to preclude). Letting the jury hear Annette Petty's hearsay statement dramatically increased the danger of such recall.

The trial judge was made aware of the problem and, with the consent of both counsel, excused all the prospective jurors who recalled any publicity about the case. Despite this precaution two jurors came forward after the first day of testimony and told the judge that they now had some recollection of a situation involving a deceased prostitute.<sup>5</sup> Neither of them seemed to connect the matter with the defendant and both said they could be fair.

- 
5. Juror Hartman wondered if there was any connection with "this girl who was killed in the hotel (A-23) . . . a young prostitute (A-24) . . . a couple of years ago or a year ago (A-24)". Juror Resler's recollection was also vague and involved "a prostitution situation and somebody had died. (A-34) . . . it was across state lines (A-34) . . ." Resler did not recall the defendant being connected with the incident.

The following morning the Buffalo Courier-Express printed an article (Ct.X 32) which announced that the defendant's trial on charges of transporting Annette Petty and Michelle Sims had begun (A-36; A-37). The article went on to relate that Miss Petty's body had been found in an area motel and the defendant had been tried and acquitted of her murder. The article, which was factually and not lurid, was prejudicial to the defendant because it supplied the link between juror Hartman's and Restler's memories and the defendant. It may also have jogged the memories of any number of other jurors. A juror who recalled the constant linking by the press of Miss Petty and the defendant could easily have found these recollections sufficient to dispell any reasonable doubt he might otherwise have had as to the defendant's guilt. Unfortunately, we will never know the effect upon the jury because the trial judge refused the defendant's request that it inquire of the jurors whether any of them had read the article (A-57). The court's basis for its denial was that it would be demeaning to suggest that any juror violated the court's prior admonition against reading about the case. The court's ruling, however, left the defendant forever in doubt as to whether or not he had received a fair trial. Only inquiry of the jurors, en banc if not individually, as to whether they had seen or discussed the article could have resolved those doubts. If the jury felt miffed by the suggestion that they had been less than scrupulous, that would have been preferable

to suffering the appearance, if not the actuality, of an unfair trial.

The American Bar Association's Standards of Criminal Justice provide for the situation here presented.

If it is determined that material disseminated during the trial raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material.

American Bar Association's Standards Relating to Fair Trial and Free Press, §3.5(f) (Approved Draft 1968) (emphasis added).

While this Standard does not, of course, have the force of law it has been widely approved. See, e.g., United States v. Concepcion Cueto, 515 F.2d 160 (1st Cir. 1975); United States v. Spinella, 506 F.2d 426 (5th Cir. 1975), cert. denied, 423 U.S. 917.

Even courts which have bridled at some of the rigidity of §3.5(f) require trial courts to inquire of the jury, at least en banc, when they may have been exposed to prejudicial publicity during trial. See, e.g., United States v. Hankish, 502 F.2d 71 (4th Cir. 1974); Margoles v. United States, 407 F.2d 727 (7th Cir. 1969), cert. denied 396 U.S. 833.

[W]here prejudicial publicity is brought to the court's attention during the trial . . . the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same.

Margoles, supra, 407 F.2d at 735.

Although there is no right to have the jury polled when the adverse publicity is not connected to the defendant, United States v. Edwards, 366 F.2d 853 (2d Cir. 1966), cert. denied, 386 U.S. 919, this is not such a case. Here the article was prejudicial but the court relied upon its prior admonition to the jury. Such reliance is misplaced; the failure to inquire is reversible error. United States v. Pomponio, 517 F.2d 460 (4th Cir. 1975), cert. denied 423 U.S. 1015.

#### CONCLUSION

For all the reasons stated the defendant respectfully urges that the court reverse his conviction and grant him a new trial.

Respectfully submitted,

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## APPENDIX

### TABLE OF CONTENTS

	PAGE
Relevant Docket Entries	A-2
Indictment, Cr. 74-270	A-4
Selections from Trial Transcript	A-6
Index (T: 1-A, 1-B)	A-7
Conference re: Motion for Preclusion (T: 2 - 14)	A-10
Conference re: Juror's recollections and Newspaper Article (T: 41 - 57)	A-23
Conference re: Testimony of Agent Skinner (T: 104 - 118)	A-38
Testimony of Agent Skinner (T: 119 - 135)	A-119
Change of Court (T: 172 - 195)	A-70
Judgment and Committment	A-94

RELEVANT DOCKET ENTRIES

Date

10/25/74                    Indictment No. CR 74-270 filed.

10/29/74                    Defendant arraigned.

01/29/75                    Magistrate's decision re: Bill of Particulars filed.

02/28/75                    Government's Bill of Particulars filed.

02/28/75                    Government's Letter requesting that trial of this case not be given special priority filed.

03/03/75                    Status report.

03/18/75                    Hearing on Motion to Suppress.

03/20/75                    Hearing continued.

04/01/75                    Government's motion to move action for trial filed.

10/01/75                    Decision and order denying suppression filed.

10/20/75                    Status report.

11/24/75                    Status report.

12/22/75                    Status report.

02/09/76                    Status report.

02/17/76                    Conference to set trial date.

03/01/76                    Conference to determine counsel.

03/22/76                    Status report.

04/05/76                    Status report.

05/17/76                    Count 2 dismissed on motion of defendant.

05/21/76                    Order dismissing Count 2 filed.

08/17/76                    Pre-trial conference.

RELEVANT DOCKET ENTRIES

(cont.)

Date

10/05/76	Government's Memorandum of Intent to Use Hearsay Evidence (Rule 804 (b) (5) Fed. Rule evid.) filed.
10/07/76	Defendant's Notice of Motion for Preclusion filed.
10/12/76	Trial commences before Judge Charles L. Brieant, Jr., sitting by de- signation.
10/13/76	Trial continues.
10/14/76	Trial continues; jury returns ver- dict of guilty.
10/28/76	Defendant is sentenced to imprison- ment for 3 1/2 years. Sentence is stayed pending appeal and bail continued. Judgment and committ- ment filed. Defendant's Notice of Appeal filed.

# In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

CHARLES EDWARD WHITE

MARCH 1974 Session ~~Term~~  
(Convened September 10, 1974)  
No. CR 74-270  
Vio. T. 18, U.S.C.,  
Sections 2421 & 1503

## COUNT I

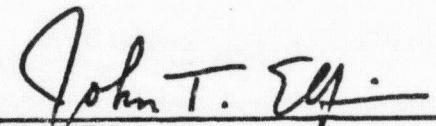
The Grand Jury Charges:

On or about the 19th day of September, 1974,  
CHARLES EDWARD WHITE knowingly did transport in inter-  
state commerce, from Buffalo, New York, in the Western  
District of New York to Erie, Pennsylvania, two girls,  
that is, Annette Petty and Michelle Sims, for the purposes  
of prostitution, debauchery and other immoral purposes,  
in violation of Title 18, United States Code, Section 2421.

COUNT II

The Grand Jury Further Charges:

On or about the 7th day of October, 1974, and continuing through the 21st day of October, 1974, in the Western District of New York, the defendant CHARLES EDWARD WHITE corruptly and by threats and force and by threatening communications did endeavor to influence, intimidate, and impede Annette Petty, a witness in the case of United States of America v. Charles Edward White, Magistrate's Docket Number 210M, then pending before Hon. Edmund F. Maxwell, United States Magistrate for the Western District of New York, in the discharge of her duty as such witness; in violation of Title 18, United States Code, Section 1503.



JOHN T. ELEVIN  
United States Attorney

A TRUE BILL:

---

Foreman

UNITED STATES OF AMERICA  
IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

CR: 74-270

CHARLES EDWARD WHITE,

Defendant.

Transcript of proceedings had and testimony taken in  
the above-entitled matter, before the HON. CHARLES L. BREWSTER,  
JR., (Sitting by Designation), United States District Judge,  
and a Jury, in the United States District Court, Buffalo,  
New York, on Tuesday, October 12, 1976; Wednesday, October 13,  
1976; and Thursday, October 14, 1976.

APPEARANCES:

RICHARD J. ARCARA, ESQ.  
United States Attorney  
(By Richard E. Mellinger, Esq.)  
Assistant United States Attorney  
United States Courthouse  
Buffalo, New York

Appearing on behalf of the Government.

MESSRS. DOYLE, DIEBOLD, BIRMINGHAM, GORMAN & BROWN  
(By Joseph D. Birmingham, Jr., Esq.)  
1340 Statler-Hilton Hotel  
Buffalo, New York 14202

Appearing on behalf of the Defendant.

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J U D G M E N TTuesday October 12, 1976

Conference in robing room

2

Jury selection and instructions

15

Government's WitnessesAlice DuBois

Direct Examination by Mr. Mellinger

19

Cross Examination by Mr. Birmingham

31

Redirect Examination by Mr. Mellinger

39

Conference at side bar

41

Wednesday, October 13, 1976

Conferences at side bar

51, 100, 135

Government's Witnesses (Continued)Michelle Sims

Direct Examination by Mr. Mellinger

58

Cross Examination by Mr. Birmingham

70

73

Redirect Examination by Mr. Mellinger

91

Recross Examination by Mr. Birmingham

92

Dominick DiPaolo

Direct Examination by Mr. Mellinger

94

Cross Examination by Mr. Birmingham

102

Conference at bench

103

Lester S. Skinner

Direct Examination by Mr. Mellinger

119

Cross Examination by Mr. Birmingham

130

LAW & V. (Continued)

	Page
<u>Wednesday, October 12, 1976 (Continued)</u>	
Government rested	135
Motion <sup>s</sup>	138, 150, 152
Stipulation	140
Defendant rested	150
Requests to Charge Conference	154
<u>Thursday, October 14, 1976</u>	
Requests to Charge Conference (Continued)	168
Charge of the Court	172
Verdict of the jury	200
Motion	202

EVIDENCE

Government's  
Exhibit No.  
(Pre-marked for  
Identification)

DescriptionMarked in  
Evidence

1	Photograph of Brenda Patterson	101
2	Photograph of Brenda Patterson	101
3	Photograph of Ann Williams	101
4	Photograph of Ann Williams	101
5	Form - Interrogation; Advice of Rights and Waiver of Rights 10-1-74	130
6	Form - Interrogation; Advice of Rights and Waiver of Rights 10-7-74	130
7	Statement of Annette Petty 10-7-74 (See Page 126)	

Buffalo, New York

Tuesday, October 12, 1976

10:00 a.m.

(In the robing room, counsel  
present.)

THE COURT: The Court has a  
Notice of Motion for Preclusion from the  
defendant, and also has a Memorandum of  
Intent from the Government to use hearsay  
evidence in the trial in compliance with  
Rule 804(b)(5) of the new Federal Rules.

I have heard counsel briefly in  
chambers with respect to this motion, and  
I have also read the papers. As I under-  
stand it, you have no objection to having  
the motion heard and decided in chambers?

MR. MELLINGER: No objection,  
Your Honor.

MR. BERMINGHAM: No objection,  
Your Honor.

THE COURT: Did you want Mr.  
White present?

MR. BERMINGHAM: It is not

necessity.

THE COURT: I would like to get a statement from the Government for the record so that I am certain it is clear what is proposed to be done. As I understand it, the statement was taken from Annette Petty, a deceased person, by Phyllis MacLain and Lester Skinner, Special Agents of the FBI. Also, the Notice suggests that the Form 302 would be introduced in evidence. The Court would not take the form, at least as presently proffered, but will entertain an application to allow the Special Agents to testify concerning the relevant portion of the statement made by Miss Petty to the Agents.

I would like to have stated for the record exactly what is sought to be elicited from the Special Agents under those circumstances, because I think a limited portion of the statement would be admissible, and some of it is so irrelevant and highly prejudicial as not to be admissible unless the statement comes in to

about an argument or recent fabrication, or something like that, so I think you ought to tell me precisely what it is in there that Petty said that you think the Agents could testify to.

MR. MELLINGER: Yes. Basically, what I would like them to testify to is the fact that she had told the FBI Agents that she was a prostitute, that Charles White was her pimp, and that he had taken her to Erie, Pennsylvania, for the purposes of prostituting her, and as to the occurrences which happened in Erie, Pennsylvania as to the fact that they were both arrested and spent some time in jail and were bailed out a few days later by Charles White and brought back to Buffalo.

There are other portions of that statement regarding his beating her, which the Government is not offering in evidence, and I think should be excised from the statement as far as the jury is concerned.

THE COURT: The conversation will have to be given. The conclusion

opportunity for Petty would not be admissible.

It is what she said that is admissible, and I would limit it to that. You have given us Petty's conclusions that Mr. White brought her there for purposes of prostitution, but if there were conversations the witness can remember, I think that might be admissible under two reasons; one, under 804(b)(5), and also under 804(b)(3).

An opportunity will have to be given to the jury to learn about the age of Miss Petty and her educational level so the jury can judge the weight to which this statement would be entitled, whether she recognized or knew that she was making a statement to the FBI, which carries a penalty if the statement is knowingly false. But it is also admissible under subparagraph (3) of 804(b) in that it shows that she was engaged in prostitution.

MR. MELLINGER: Your Honor, just so I fully understand the Court, the conclusion, you say, would not be admissible as to the fact that Charles White had

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taken her to Erie, Pennsylvania, for that purpose.

THE COURT: This has to be based on a conversation, doesn't it? Isn't that what she is testifying to, an admission against interest by White to her saying "I want you to go to Erie, Pennsylvania" and engage in whatever he said to her?

MR. MELLINGER: Yes.

THE COURT: I have considered all the contentions discussed, and if there is anything that has to be set forth to make a complete record, I think you ought to do so now, MR. BIRMINGHAM.

MR. BIRMINGHAM: Thank you, Your Honor. If I could have just a moment, please, to look through the statement here.

THE COURT: Certainly.

(Pause in the proceedings.)

MR. BIRMINGHAM: One of the real problems with this is that so far as any statement by Charles White is concerned we are now at third hand. The Government's contention, as I understand it, is that

Mr. White said things to Miss Petty.

MR. COOK: And brought her to Erie, Pennsylvania.

MR. BREWSTER: Yes, but insofar as what he said, he said things to her which presumably, according to the Government's contention, she repeated in some measure to the Government witness, and it is the Government's witness, the FBI Agent, who will now be in court to testify to it.

THE COURT: I think perhaps that raises a point, which ought to be considered. The fact that he brought her there is not third-hand hearsay. The fact that he bailed her out of jail, if he did, is not. Those are acts and not statements of White's. Perhaps the inquiry ought to be limited on the Government's direct case to that. If cross-examination opens up the door for statements, then they may come in to rebut recent fabrication contentions.

MR. MELLINGER: I'm kind of wondering as to how about her statements as to the fact that she was a prostitute.

to which there would be admissible, I believe.

MR. BIRMINGHAM: In fact, her relationship with White was that he was her pimp.

THE COURT: You see, that calls for a conclusion. If she told the Agents that White receives the money, I suppose it is factual, isn't it? I imagine that would be admissible. Yes, I would let you admit that.

MR. BIRMINGHAM: Even in this somewhat abbreviated form over what the Government had apparently orally proposed, we have a number of objections to this procedure. First of all, the probity of this matter is far outweighed, and I submit

THE COURT: The probative force?

MR. BIRMINGHAM: The probative force by the extreme prejudice which may result. You see, unfortunately, in many, many regards, the least of which perhaps is this force upon this case -- Miss Petty was murdered two years ago.

THE COURT: That certainly will

not be permitted in the record.

MR. BIRMINGHAM: I appreciate that.

THE COURT: He will have to prove the fact of her death, unless it is stipulated to, but he will not be able to prove that she was murdered at all, or that she was murdered by anyone.

MR. BIRMINGHAM: We obviously concede that she is dead, and in the interest of keeping out a death certificate which would show a homicidal death, I would certainly stipulate to it.

The problem really is that that case received an immense amount of publicity, both at the time of the original murder two years ago, and at the time of the trial of the action in January and February of this year, when Mr. White was ultimately acquitted.

Now the Government's contention in originally proposing the second Count of this Indictment, and the contention of the State of New York in trying Mr. White, was that his motive in killing this girl,

as they alleged that he had done, was precisely that she was going to testify against him in the Mann Act proceeding, which we are about to try. Those are the kinds of facts which unfortunately lodge in people's minds. It was an exciting thing. It was a big deal. And I am extremely concerned, as I have stated in my papers, that what we are going to have here, is some juror or jurors who during the course of this trial, as the name Annette Petty continues to come up, and as we hear through the Government's witnesses these statements from her, are going to remember this whole murder business of which he has been acquitted, and from which the Government has been barred from trying him and which Your Honor has indicated they will not be permitted to refer to. Obviously, I have no wish to refer to it.

THE COURT: May I say this. I think you have made the point, and I will be willing to probe into that issue as deeply as possible by means of voir dire

Inquiry of the plaintiff, or if you would like me to compose or suggest any questions or any lines of inquiry which will prevent us from this subliminal memory coming to light as the case progresses, I would be entirely willing to follow up on that. I don't have very much direct familiarity with the jurors here, but you know jurors have their own lives and their own problems, and they don't pay too much attention to the criminal news. They don't pay too much attention to the press. If a jury can be found for Mitchell and Stans, it can be found for Mr. White. I don't think that is a problem.

MR. BIRMINGHAM: I hope that we can find a jury, and I certainly will take Your Honor up on your offer with respect to the drafting of questions. My problem really is that introducing her statement is to let her, as it were, speak really from the grave, and introduces an unreasonable risk of the precise harm which by the voir dire examination we seek to avoid.

THE COURT: I reject that argument here, and I think it can be avoided. There is no basis for the jurors to assume he murdered her, or even that she died a violent death.

MRS. BIRMINGHAM: It was that kind of fear which led me to make this motion in limine, at the threshold.

THE COURT: Rulings in limine don't always include everything that is in the trial record, and the Court might, although I doubt it very much, perceive the situation differently as the Government's case unfolds. I have not dealt in my discussion on the record with you with that contention made that there is a better source for the information. But if the testimony of Michelle Sims should be entirely contradictory, I think that presents a situation where the hearsay statement wouldn't be entitled to any weight in the mind of a reasonable juror. That is something we will have to consider when the time arises.

... statement on the other hand, if the statements of Michelle Sims are in accord with the Government's theory of the case, there is no need for the hearsay statement of Annette Petty. It is our position, and at least in terms of Rule 804(t), that factor alone should be sufficient to preclude it.

THE COURT: Michelle Sims doesn't present a very desirable witness, and I assume the credibility of two prostitutes is greater than that of one.

MR. BIRMINGHAM: The thing that I did not address myself to in the papers because it was not addressed in the Notice of Motion is the question of whether or not this is a statement against Miss Petty's penal interest, although there is very little case law on it in the Federal Courts because of the newness of the rule, at least the case law that I was able to find quickly, and it is our position and will be our position on the trial that Miss Petty was not in any real way making a statement against her penal interest, that

she was both here and in the Court room  
a Government witness and was, of course, fe-  
tally or not I don't know, but certainly  
as a substantial and practical matter,  
assured that there would be no prosecution  
against her. She was their witness, and  
these statements, therefore, do not have  
the indicia of truthfulness that a true  
statement against penal interest might  
have.

THE COURT: I have been assuming,  
at least in part, as a basis for my ruling  
that it does, and a proper foundation will  
have to be established at trial. You may  
have voir dire examination if requested  
at the time. You can ascertain exactly  
what the atmosphere was when Miss Petty  
was giving her statement to the FBI, and  
you may inquire on the examination of the  
agents in voir dire exactly what repre-  
sentations or promises, if any, they made  
to her. That is proper inquiry at the  
trial. My ruling is conditional, based  
on things developing as the Government  
suggests them.

I would like you to understand that your  
absence is not a violation of your obligation  
to be present at the trial. Thirty thousand mon-  
day, and your failure to be present might  
constitute a separate Federal felony  
without regard to your guilt or innocence  
in this matter. Do you understand that?

DEFENDANT WHITE: Yes.

THE COURT: You understand also  
that the Court would have the power to  
proceed without your absence, but I cer-  
tainly wouldn't want to do that. Is that  
clear to you, your obligation?

DEFENDANT WHITE: Yes, it is.

(Conference at the side bar  
between Judge Bryant and Juror Joseph  
Hartman.)

THE COURT: What is on your  
mind?

JUROR HARTMAN: When you were  
talking about that deceased girl, I was  
just wondering, has that anything to do  
with this girl who was killed in the  
hotel?

THE COURT: Have you read some-

THE COURT: I don't know.  
I mean you know, two years or three  
years. I am not sure. I want to be  
honest about it.

THE COURT: Do you remember read-  
ing about it?

JUROR HARTMAN: All I remember  
is a young prostitute was supposed to have  
been killed or something.

THE COURT: Do you remember any-  
thing more than that?

JUROR HARTMAN: No, that is all,  
Your Honor.

THE COURT: Assuming it was the  
same girl, and I am not saying it was,  
but would that affect your verdict, to  
give a fair verdict?

JUROR HARTMAN: I would give a  
fair verdict. I just want to be honest.  
I am not sure.

THE COURT: You have heard about  
a prostitute being killed somewhere?

JUROR HARTMAN: A couple of  
years ago or a year ago.

THE COURT: I will ask the

Juror Hartman, if you can identify him.

He was in the room. I just remember him saying she was deceased, and I was wondering if that was the same girl.

THE COURT: Please step down in the hall and don't speak to anybody else. Just stand outside the door.

(Juror Hartman left the courtroom.)

THE COURT: I will ask the Court Reporter to read back the discussion between this juror and the Court which was just reported.

(Record read.)

THE COURT: What is your pleasure, gentlemen?

MR. BIRMINGHAM: Your Honor, as I indicated to you this morning in the argument of the motion respecting the hearsay testimony of Annette Petty, I am extremely concerned about jurors who have recollections, even vague recollections, of this case. This man's

recollection has now been triggered, and I think an incentive to go on with the proof, if it is only going to improve his recollection. His recollection is only going to improve.

THE COURT: I don't know how it can be improved. I would be willing to tell him that prostitutes get killed in hotels all the time, that he shouldn't draw any inference that this is the same girl. Even if he should think it was, it has nothing to do with this case. It certainly has nothing to do with Mr. White, but if you have a motion to excuse the juror and want to use an alternate juror instead, I would be willing to give that consideration also.

You see, he injected the thought of a girl being killed in a hotel or motel, I believe he said, and that was never presented at any time, so that indicates to me he is not fooling us just to get away from doing jury duty.

MR. HUMMELMAN: I quite agree with Your Honor.

MR. BERMINGHAM: I think the fact that this juror came forward and brought this to the Court's attention, and he also stated to the Court that he made no connection between this girl's death and the defendant in this case, I think possibly the Court should instruct this juror at least to keep his recollections to himself until the end of the trial and not to inform the other jurors. And we can possibly inquire of him prior to deliberation, and I'm kind of worried if you start dismissing jurors, it is a good possibility that we will go through those two alternates pretty fast.

THE COURT: If we do, we will simply impanel a new jury. I don't regard this as something that would be a lengthy trial. I expect to go right forward tomorrow.

Do you want to sit by for a day and see what happens and have me instruct him, or do you want me to excuse him now and use the alternate?

MR. BERMINGHAM: My preference

would be, Your Honor, to excuse him now.

THE COURT: I think he is a fair-minded juror because he came forward and told us this.

MR. BERMINGHAM: I think that he is, too.

THE COURT: I will tell him that there is no reason to assume that it is the same girl. Girls are being killed all the time.

MR. BERMINGHAM: I would ask Your Honor to make this inquiry of him whether the fact that he has now had some recollection and that he considered it important enough to go to the Court and that the Court has treated it seriously, are all these factors in any way going to weigh upon him or impede him in any way in simply listening to the evidence as a fresh, impartial person. That is my concern.

THE COURT: I can ask him that. I think he will probably tell me it will not.

MR. BERMINGHAM: If he tells

you that, Your Honor would be in a better position to rule on my request to discharge him than you are now.

MARSHAL ANDERSON: Your Honor, I am one of the Marshals, and at the last recess, Juror No. 1 approached me, and I cut him off. I did not engage in a conversation. But he said something about this rang a bell. He said, "May I ask you a question?" And I said, "Sure, ask me anything." And he said to me, "It is about this case." I said, "I don't think we should discuss it," and I left. I got the distinct impression that something about it rang a bell in his mind.

THE COURT: I'm going to instruct him to hold the whole matter in abeyance. I will ask him the question you suggested, and I will rule later on because there is a practical aspect to it. And this man does seem very forthright and honest. He is trying to comply fully with what the Court asked him to do.

Mr. BENMILLER: Sir, I have, and will  
Your Honor inquire of Juror No. 1 whether  
or not the matter in which he approached  
the Marshal is something that he should  
bring to Your Honor's attention.

THE COURT: Tomorrow, and remind  
me if I don't do it.

(Juror Joseph Hartman entered  
the courtroom.)

THE COURT: I want to thank you  
for bringing the matter to the Court's  
attention at this time, and I want to  
ask you one further question:

Would any vague recollections  
that you may have heard or may come  
back to your mind affect you in any way  
in giving an absolutely fair and impartial  
verdict in this case?

JUROR HARTMAN: No, Your Honor.

THE COURT: Would it weigh  
against this defendant in any way?

JUROR HARTMAN: No.

THE COURT: You understand  
that there is nothing particularly sig-  
nificant about something happening to a

prostitute?

JUROR HARTMAN: The only reason I said that, Your Honor, is because when he said "deceased," I just remembered that part.

THE COURT: Lots of prostitutes are deceased. There is nothing significant about it. I want to direct you as solemnly as I can. Do not discuss with any other juror any recollection that you have about this matter. There is nothing in connection with it that should weigh against the defendant in any way as far as whether or not the allegations in this case are proved beyond a reasonable doubt or not. I give you my assurance that it has nothing to do with this case.

Now if you have further recollections about the matter as the case goes on, I would like to know about them, and specifically, I don't want you to discuss your recollections with any other jurors.

JUROR HARTMAN: Yes, Your

Honor.

THE COURT: And whether you will be excused or not is a matter I will consider as the case progresses, but I do charge you that you are not to discuss it with anyone else.

MR. HARTMAN: Yes, sir.

THE COURT: And you are not to draw any inference whatsoever.

You are excused for the evening.

(Juror Hartman left the courtroom.)

THE COURT: We will be in recess, gentlemen.

MR. MELLINGER: What time are we going to resume tomorrow, Your Honor?

THE COURT: Nine thirty.

(At 4:55 p.m., an adjournment was taken to Wednesday, October 13, 1976, at 9:30 a.m.)

- - -

Buffalo, New York.

Wednesday, October 12, 1976

9:30 a.m.

- - -  
(Jury not present.)

(Side bar conference between  
the Court and Juror Allan J. Resler.)

THE COURT: Would you state your  
name for the record?

JUROR RESLER: My name is  
Allan J. Resler.

THE COURT: You are Juror No. 1?

JUROR RESLER: Yes, sir.

THE COURT: May I say first that  
I am not permitted to talk to a juror ex-  
cept on the record, and I didn't mean to  
be rude to you in the hallway when I  
didn't say anything to you when you spoke  
to me. I understand you wanted to see me,  
and I am now prepared to hear what you have  
on your mind.

JUROR RESLER: When you briefed  
yesterday on the case, you mentioned these  
two women, and it went back as far as 1974.  
And I didn't associate at all what you had

said in the papers, but when the U. S. Attorney mentioned the fact that one of the girls was deceased, it seemed to have rung a bell, but that is about all. But as far as the case itself is concerned, I am in no way biased about it.

THE COURT: What kind of a bell did it ring?

JUROR RESLER: Only for the fact that there was this situation of a prostitution situation, and that somebody had died. It was in that vein. That is about all.

THE COURT: Do you remember any facts or circumstances concerning the death?

JUROR RESLER: No, except the fact that it was across State lines, but that was all.

THE COURT: Did you ever hear the name of this defendant?

JUROR RESLER: I don't recall the name of the defendant.

THE COURT: I mean Mr. White, who is on trial.

JUROR RESLER: No, I don't recall the name at all.

THE COURT: You never heard or read anything about him?

JUROR RESLER: No, sir.

THE COURT: Will you put out of your mind anything that you may have read about a prostitute being deceased, and we have to assume that happens relatively frequently, don't we?

JUROR RESLER: Yes.

THE COURT: Put that totally out of your mind and don't discuss any memory you may have with any other juror, and if in the course of the trial your memory comes back to you later, then I wish you would ask to see me again.

JUROR RESLER: I would, but I think I can qualify that, Your Honor, by saying that is about all I can remember about it, and nothing else as far as the case is concerned.

THE COURT: I will not excuse you from the jury at this time. It is essential that there be a fair and impar-

tial jury, and if anything comes back to you, then ask to see me again.

Now I don't want you to infer that anything that had to do with the prostitute had anything to do with Mr. White because it does not.

JUROR RESLER: No.

THE COURT: You may return to the jury room, and please don't discuss with other jurors the nature of our discussion.

JUROR RESLER: I won't.

Thank you very much.

(Juror Resler left the courtroom.)

THE COURT: The Court Reporter will read to you the statement that I received from Juror No. 1 at this time.

(Record read.)

MR. BIRMINGHAM: Your Honor, perhaps you have had a chance to see the morning paper, and perhaps you have not. I don't know.

THE COURT: I have not. What page?

MR. BIRMINGHAM: This is at Page 12, which is the back page of the

first section. And I believe it is the sixth column towards the bottom, and the heading is, "Jury hears testimony in vice case."

There is about a four-inch column article, I guess. I think that it had best be marked for identification, a copy of the paper. I brought a copy for this purpose, Your Honor.

THE COURT: I have instructed them not to read the papers or listen to the radio or television, and I will renew that instruction if you like.

MR. BIRMINGHAM: Would you inquire of them whether any of them have, through inadvertence or otherwise, read anything in the paper or heard anything on the radio and television with respect to the case?

THE COURT: I have no basis to assume that any of our jurors have violated my instructions. I think it is demeaning to suggest to them that they may have disobeyed the Court's directions unless I had a basis to ask them that. I bought the newspaper this morning, and I had it at

breakfast, and I didn't pick it up. It is a relatively small article at the bottom of the page here, and I really didn't see it, and I would have been interested to see it.

If there is any reason to believe that they were looking at the paper, of course, I would ask if anybody read it. It is reasonable to assume that some of them do see the paper. They were not instructed not to look at the paper.

MR. BIRMINGHAM: I think they almost were, practically in those words.

THE COURT: I am not sure whether I said it or not.

MR. BIRMINGHAM: The problem is with someone reading the paper at all. This headline is not necessarily going to alert them to the fact that it is the thing that they are not supposed to read.

THE COURT: The second line says: "Charles E. White," and the first sentence is entirely a matter of the court record. You don't get into any trouble with the article until you get down to the bottom part of it where it says that he was accused

of a murder and found innocent. And I assume that the jurors would believe if he was found innocent that he was innocent. They certainly should believe that.

What is your application?

MR. BIRMINGHAM: My application is to inquire of the jurors as to whether or not any of them read any article in the newspaper or heard anything on radio or television.

THE COURT: I decline to do it at this time; however, at the end of the day I will admonish them again about the paper. I will include in my instructions that they shouldn't see anything inadvertently.

All right, gentlemen.

MR. BIRMINGHAM: May this be marked as a Court Exhibit?

THE COURT: Yes.

(Court Exhibit 32 marked for identification.)

THE COURT: Bring in the jury.

(Jury present.)

Mr. Billie Burton Skinner, and he will testify to the conversation he had.

(In open court.)

THE COURT: Members of the jury, we are going to have a brief recess at this time.

Don't discuss the case, and don't read any newspapers during lunch and recess, and we will resume in a short while. Please withdraw.

(The jury left the courtroom.)

(Recess)

(Jury not present.)

THE COURT: May I have the application made on the record which we have just discussed a moment or two ago about Mr. Skinner, if you will.

MR. BIRMINGHAM: Yes, Your Honor. It was my application. I understand that the primary purpose of calling Mr. Skinner is to testify to hearsay statements of Annette Petty and Michelle Sims. I think that there is a substantial question as to their admissibility, and if the jury were to hear them, I believe they are so preju-

dicial to the admissions that they would not be able to strike them from their mind if they were subsequently so ordered by the Court after hearing the full basis for their admission. So I would ask that we have an examination of the witness outside of the presence of the jury so that Mr. Mellinger can establish, if at all possible, the proper basis for the admission of the statements.

The difficulty I'm beginning to have with this entire statement which shows the problems presented by trying to make advance rulings on admissibility is that it is entirely accumulative of what the admissible part of the statement is, entirely accumulative of what this witness Sims has just testified to, and what DuBois testified to.

Now it is not my function to limit the Government as to how much evidence they can bring in, and there is no question that both Sims, and to an extent, DuBois, are doubtful as to their truthfulness. I don't really understand why we

have to hear it twice.

I am not clear exactly what we would hear in the absence of the jury, which is not presently known to the Court, and --

THE COURT: What do you say about this, Mr. Mellinger? Do you want to take a simple case and intentionally put error in it?

MR. MELLINGER: No, but I think a very real question in this case about the credibility of Michelle Sims, who is a person who can definitely testify as to what their purpose was in going to Erie, Pennsylvania, and what happened there, and somewhat corroborated by Alice DuEois but not all that much.

Special Agent Skinner's direct testimony should take five minutes at the most.

THE COURT: You see, it is a statement against her penal interest. Even though she is only fifteen, she can still be incarcerated until she is twenty-one. Who knows what they can do to you in

Brie, Pennsylvania, to minors who engage in prostitution.

On behalf,

MR. MELLINGER: Also, Mr. Skinner testified as to the circumstances. He took two statements from Annette Petty. One was an oral statement, and the other one was a signed statement by her. The oral statement was taken at the Buffalo Police Department. He testified that he had identified himself as a Special Agent, and he also asked her to sign an Advice of Rights and Waiver of Rights Form on that occasion. And also on the second occasion of the statement, he asked her to sign an Advice and Waiver of Rights, which I think is relevant as to the probity of the statement.

Your Honor, I have a statement with certain portions of it lined out, and these were portions that I was intending to have Special Agent Skinner read.

THE COURT: Let's go off the record for just a moment.

(Discussion off the record.)

THE COURT: I have made some  
penciled marks on this photostatic copy  
of some matter which I think ought to be  
redacted from the statement, and I think  
as redacted that he could testify that  
she told him that in substance and there-  
after wrote out that information, or  
wrote out in his handwriting, and she  
wrote on the bottom of it. I think there  
is nothing in it except what has already  
been testified to and --

MR. BIRMINGHAM: Your Honor,  
may I first of all have an opportunity  
to look at the proposed redactions?

THE COURT: The green pencil and  
ink are my own changes for further redac-  
tion.

MR. BIRMINGHAM: I would like  
for a moment to look at this, and then I  
would like to make my objections to part  
of it; and secondly, if I have any further  
suggestions as to redaction --

THE COURT: May I say that I  
believe the witness could testify to his  
past recollection and obviate any chance

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that the jurors will want to see the statement itself. No matter how redacted, if it looks cut up, they will perceive that something was cut out of it.

MR. BIRMINGHAM: Yes.

THE COURT: Off the record.

(Discussion off the record.)

MR. BERMINGHAM: Beginning backwards, Your Honor, I don't see anything else other than what Your Honor and Mr. Mellinger have indicated that needs to be redacted if this is to be admissible at all, except the statement here where it says, "No promises or threats have been made to me and no pressure, coercion of any kind has been used against me."

I think that that, frankly, is a self-serving declaration by --

THE COURT: The witness could be asked whether he or the FBI agent in his presence made any threats or coercion.

The Government can bring that out if they want. They can bring out the circumstances and the atmosphere of the interview, and, of course, so can you on cross examination.

My real thought of it is that the proper way to do it is to have the witness testify as to what she said and what took place in his presence, and he may use that redacted statement there to refresh his recollection if he needs to.

MR. BIRMINGHAM: My fundamental objections, in addition to those stated in my original motion papers, are, first of all, that I don't believe as I read this statement that this is against her penal interest.

THE COURT: She admits to engaging in prostitution, or at least an accessory to prostitution, or an attempt to commit prostitution. She also admits in that statement to soliciting at the truck stop, and even though she is under age, she could still be confined -- I don't think there is any question from what she admits to in there that she could lose her liberty.

MR. BIRMINGHAM: Of course, I realize that her admission is simply not sufficient, and in the absence of the truck driver and so on, it is just like the

classic statement, "Sure, I have smoked marijuana."

THE COURT: But she has gone further and said -- I think she knew she was talking against her penal interests.

You see, this statute was meant to be a remedial statute to prevent a prosecution from failing because a witness had died in the interim, or become unavailable or took the Fifth Amendment, or whatever. And this is a classic case except for the fact that it tends to be accumulative.

I don't have to suggest any arguments to you, but there are plenty of them that are available, and they are questions for the jury in their ultimate wisdom and their common sense in hearing the testimony of one whore and the statement of another, and they observed the one and they can assume the other one is like the first, and they may disregard it in its entirety, but we are talking now only about admissibility, not weight.

MR. BIRMINGHAM: Yes, sir.

THE COURT: I think it hurts the requirement for the rule to be admissible, not only because it is against her penal interests, but also it is a statement to the FBI. She has been told that the statement could be used against her in court, and, of course, it has extrinsic factors which cements its reliability. It has the fact of the arrest in Erie. It dovetails almost completely with the testimony of DuBois and Sims, so that tends to bring it within subparagraph 24 of Rule 803 of the Federal Rules of Evidence --

MR. MELLINGER: Which is it?

THE COURT: Subparagraph 24 of Rule 803 -- in that it has the circumstantial guaranty of trustworthiness, and I think it does in view of the fact that she, herself, was arrested in Erie at the time and place therein stated. And she, herself, was dressed by Miss DuBois and departed Buffalo on the 19th, directly prior to her arrest and for the stated purpose of going to Erie, plus the testimony of Sims. They are all circumstantial guarantees

of reliability.

MR. BIRMINGHAM: If I may, Your Honor, I appreciate the fact that you have given this matter some very careful consideration, but I would, nevertheless, like the record to reflect --

THE COURT: Certainly, you shall have a complete and continuous objection to the entire line of testimony.

MR. BIRMINGHAM: I have just a couple of grounds that I would like to state so they are explicit on the record.

THE COURT: All right, and everything that I put on the record when I heard your motion prior to trial, you still retain and have those exceptions.

MR. BIRMINGHAM: Yes. Thank you, and I will try not to be repetitious, but I did want to say that I do not believe that there is any indication of the slightest other than the fact that she signed a Waiver of Rights Form that she was anything but, or considered herself to be anything but the Government's witness and that she assumed that she had complete protection

from the Government and that included protection from any kind of prosecution whatever, so I think under the circumstances in this case, in the way in which this witness was treated by the Government, both by the FBI and by the Buffalo Police, that she could well assume that she was not making a statement against her penal interests.

THE COURT: What is the date of that statement again, please?

MR. MELLINGER: The date of this statement is October 7, 1974.

THE COURT: She was not in custody at that time?

MR. MELLINGER: No, she was not.

THE COURT: She spent two nights in jail in Erie?

MR. BERMINGHAM: In mid-September.

THE COURT: And then what happened to her from that time forward?

MR. BERMINGHAM: She came back here, and for one reason or another, she made the complaint against Charles White that he had harassed her. She went to

the police, and she began to give them this kind of statement. She gave a similar statement to Mr. Skinner on October 1st, which was a basis for the initiation of the prosecution against Mr. White. And then on October 7th she gave this further statement which was in writing, but it is a part of the same continuing --

THE COURT: Of course, the earlier statement might have greater reliability if your argument which you are making is to be considered. I have not seen the earlier statement, but if that is so --

MR. BIRMINGHAM: It was oral.

MR. MELLINGER: It was an oral statement.

THE COURT: He must have made notes of it, didn't he?

MR. MELLINGER: Yes, and I intend to question him on this prior statement.

THE COURT: Let's not have overkill. I should not have to take both statements, but the closer in time and the less time that elapsed during which she

could make her peace with the prosecutor, if she did, the more reliability it would have. I think that is so. I think it is within the rule. You might question the wisdom of the rule -- I do not. I think it is addressed to the common sense of the jury, and there is certainly plenty of argument that may be made against the weight of it. But the admissibility of this statement is almost a classic case of what this rule was intended to provide for. It represents a change in the law, and the Court should not seek ways to evade what Congress was trying to do.

MR. BIRMINGHAM: There is one other point which I would like to make clear for the record. The rule notwithstanding, I think the admission of this kind of evidence is a clear violation of the confrontation clause of the Sixth Amendment to the United States Constitution. This seems to me as precisely the kind of accusatory statement by a party in interest that the confrontation clause is most clearly directed against.

THE COURT: I don't think we

should argue it any further, gentlemen.

I believe you have protected your record more than adequately, and it is certainly an interesting point, but I have made my ruling, and I think we ought to go forward.

I don't see any purpose of examining Mr. Skinner. He is a man who has had some experience testifying, as I understand it and if he puts his foot in it, that will be just too bad, and we will have a mistrial. So you instruct him that he is to limit his testimony to those matters not crossed out.

MR. MELLINGER: What about the first conversation that he had with her on October 1st?

THE COURT: I don't know what the gist of that conversation is. You see, you gentlemen know this case so well, and I don't.

Does he have notes of this conversation?

MR. MELLINGER: Yes. There is a 302 which has been provided to Mr. Birmingham.

THE COURT: I suppose you could bring out that she told him substantially the same thing at first if you wanted to, but --

MR. MELLINGER: Your Honor, I will be brief on it in my direct examination.

THE COURT: All right.

MR. BIRMINGHAM: Maybe rather than to get into this conclusory language such as, "She told me substantially the same thing on the 1st," perhaps it might be wiser to ask, "Did you interview her on the 1st," and then, "Did you go back on the 7th and then get a written statement?"

THE COURT: All right. It is not up to me to instruct the Government how to try it.

MR. MELLINGER: Your Honor, may I have just a few minutes to talk to Mr. Skinner?

THE COURT: Yes.

(Recess)

(Jury present.)

... MELLINGER, in examination.

witnessed by Lester Skinner at that time.

LESTER S. SKINNER,

called as a witness by the Government, being first duly sworn,  
testified as follows:

DIRECT EXAMINATION:

BY MR. MELLINGER:

Q Mr. Skinner, where are you employed?

A The Federal Bureau of Investigation.

Q What is your position there?

A Special Agent.

Q How long have you been so employed?

A Approximately five and a half years.

Q As a Special Agent, did you ever have occasion to investigate a Charles Edward White regarding transportation of Michelle Sims and Annette Petty in interstate commerce for the purposes of prostitution?

A Yes, sir.

Q Regarding this investigation, did you ever have occasion to interview a girl by the name of Annette Petty?

A Yes, sir.

Q On how many occasions?

A Twice.

THE COURT: Excuse me. Isn't  
there a stipulation or something with

respect to that?

MR. BIRMINGHAM: Yes, there is,

Your Honor.

THE COURT: I think that ought to come in before this witness is examined.

MR. BIRMINGHAM: I am signing it now.

THE COURT: I think it is sufficient to just read it into the record if you want to.

MR. MELLINGER: Yes, Your Honor.

For the purposes of this trial, the Government and the defense have stipulated as follows: It is hereby stipulated between the Government and the defense for the purpose of the trial of this action that Annette Petty is now deceased, and the second stipulation is that Government's Exhibits 1 and 2 are photographs of Annette Petty.

THE COURT: Members of the jury, in this case you may treat a stipulation of counsel of that sort with the same force and effect as if a witness had been brought onto the stand and had taken the oath and

had testified to these facts set forth in  
the stipulation.

MR. MELLINGER: Thank you, Your  
Honor.

DIRECT EXAMINATION CONTINUED

BY MR. MELLINGER:

Q On how many occasions did you talk to Annette Petty?

A Twice.

Q Were these interviews?

A Yes, sir.

Q When was the first such interview?

A On October 1st.

Q Where did this take place?

A Buffalo, New York, Police Department.

Q And was there anyone else present besides yourself and  
Annette Petty?

A Yes, sir.

Q Who was that?

A Special Agent Phyllis MacLain.

Q And what did you do at the outset of that interview?

A I advised Antoinette Petty of our identity and the purpose  
of the interview. I advised her of her rights on a Waiver  
of Rights Form which she read and stated she understood,  
and signed.

THE COURT: Was Miss Petty in

custody of anybody at this time? Was she  
in custody of the Buffalo City Police?

A I don't think so, Your Honor.

THE COURT: How did it happen  
that you were interviewing her there?

A The Buffalo Vice Squad called me and told me about the  
information she had given.

THE COURT: All right.

Q You said you gave her a form to read on this first inter-  
view?

A Yes.

Q Did she read this form?

A Yes.

Q And what is the title of that form?

A "Interrogation; Advice of Rights."

Q I show you Government's Exhibit No. 5 marked for identifi-  
cation. Would you look at that, please, and do you recog-  
nize that?

A Yes. This is the form I gave her on that date.

Q How do you recognize that to be the same form?

A I have my signature on it as one of the witnesses.

Q And did she sign this form in your presence?

A Yes, sir.

Q Did Annette Petty have occasion to tell you about a trip  
which she took to Erie, Pennsylvania?

A Yes, sir.

Q And did she tell you when she took this trip?

A Yes. She said at some time in the middle part of September.

Q What year?

A '74.

Q And who, if anybody, did she say she went with?

A She said she went with Michelle Sims and Charles White.

Q Did she say she went with anybody else?

A No. On this date she didn't.

THE COURT: Which interview was this?

MR. MELLINGER: The October 1st

interview.

Q Did she know the exact date of the trip at that time?

A No, sir.

Q What did she say she did when she got to Erie, Pennsylvania?

A She said she prostituted herself.

Q And did she say she was working for herself or for somebody else?

A She said she was working for somebody else.

Q Who did she say she was working for as a prostitute in Erie, Pennsylvania?

A Charles White.

MR. BIRMINGHAM: Objection.

And the other objection which I have made,

and which I would raise and which is on the record, but this is out of the area which we just discussed.

THE COURT: Yes, I think so, and I sustain the objection.

Mrs. BERMINGHAM: I move for a mistrial.

THE COURT: I deny the motion for a mistrial; however, I will direct the jury to disregard and to put out of your mind any possible inference which the asking of any such question might conceivably raise. You are to decide the case on the testimony and the Exhibits which are allowed in evidence and not on any speculation what somebody might say if they were permitted to say it. Put it out of your minds.

DIRECT EXAMINATION CONTINUED

BY MR. MELLINGER:

Q Did she tell you what, if anything, happened to her in Erie, Pennsylvania?

A She said she was arrested by the Erie, Pennsylvania, Police Department.

Q And what was the second occasion on which you had inter-

viewed her?

A It was on October 7th.

Q What did she do on this occasion?

A Myself, along with Special Agent Phyllis McLain, went to her residence to interview her.

Q Who else was present?

A Antoinette, and Antoinette's mother, Mrs. Petty.

Q In what part of the house did this interview take place?

A In the kitchen.

Q Where was her mother?

A In the living room.

Q What did you do at the outset of this interview?

THE COURT: Where is this house  
where this interview took place?

A On Butler Avenue in Buffalo.

Q What did you do at the outset of this interview?

A I advised her of what we were doing there. I again advised her of her rights, which was on the Advice of Rights Form, which she read and stated she understood and signed.

Q I show you Government's Exhibit No. 6 marked for identification. Do you recognize that?

A Yes, sir.

Q Would you tell the jury what that is, please?

A It is an Interrogation; Advice of Rights Form, which was witnessed by me.

Q In that the form that she signed in your presence?

A Yes, sir.

Q Did you conduct an interview with her on that date?

A Yes, sir.

Q And did you reduce this interview to writing?

A Yes, sir.

Q And did you ask her to read over this written interview, the summarization of the interview?

A Yes, sir.

Q Did she do this?

A Yes, sir.

Q I show you Government's Exhibit 7 marked for identification and ask you to look at that, and do you recognize that?

A Yes. It is a Xerox copy of the statement I took from her.

Q Is that the statement which she signed?

A Yes, sir.

Q And what did she state in that signed statement?

THE COURT: If the statement refreshes his recollection, then the witness may tell the Court and jury what Miss Petty said about any particular relevant matter, but as far as asking him to tell you what the statement says, that is not a proper form of examination...

Q Do you recall at this point what was set forth in that

statement?

A No, not right offhand.

MR. MELLINGER: Would you look at that statement?

(Statement handed to the witness.)

THE COURT: If you looked at it, would it refresh your recollection as to what Miss Petty said to you and to Agent MacLain?

A Yes, sir.

Q Does that refresh your recollection?

A Yes.

Q Will you tell the Court what Miss Petty told you and Agent MacLain at that time, October 7th, 1974?

MR. BIRMINGHAM: Objection, Your Honor.

THE COURT: Objection sustained.

I take it you are objecting to the form of the last question.

MR. BIRMINGHAM: Yes.

THE COURT: I sustain the objection.

Q Mr. Skinner, is your recollection now refreshed?

A Yes. A synopsis of this particular signed statement would be her trip going to Erie, Pennsylvania.

Q And what did she say to you?

A First, what did you say to her when you began this interview?

Q It tells that I advised her of her rights and didn't use any threats or pressure to get this particular statement. Then she gave me her date of birth and told me she had completed the ninth grade and could read and write the English language.

Q What was her date of birth?

A March 19, 1959.

THE COURT: That is what she

told you at that time?

A Yes, sir, and her place of birth was Buffalo, New York.

Q What did you ask her, and what did she say to you?

A Well, she told me that she met Charles White approximately about four months prior to taking this particular statement, and she saw him again in September.

Q Of what year?

A Of 1974. And Michelle Sims was with her at this particular time. Then on September 19th, 1974, she, along with Michelle Sims and Charles White, went to Erie, Pennsylvania.

Q What else did she say at that time?

A She said at this particular time another individual, and the last name unknown -- she didn't know who he was -- that James went with them in Charles Edward White's car,

29

which was a Duster.

Q Did she say what color this car was?

A Yes. She said it was brown. She said that they arrived in Erie approximately twelve o'clock midnight and that they were let out of the car. Then after they got out of the car, Charles White and James, last name unknown, went down the street and parked the car, and she, along with Michelle Sims, stayed on Peach Street for approximately fifteen minutes. A white male driving a yellow Duster talked to Michelle Sims, and she said she saw Michelle Sims get in the car with this white male, and she saw Michelle Sims perform a "blow job" on this particular white male. And then she told me that after Michelle Sims got out of the car they had come across the street, and they were arrested by the Erie, Pennsylvania, Police Department.

And on the last page she wrote in her own handwriting that she had read the statement consisting of this particular page and four others, and she initialed all corrections, that it is true and correct and to the best of her knowledge, and after that she signed it, and I witnessed it along with Special Agent Phyllis MacLain.

THE COURT: Phyllis MacLain is a Special Agent with the FBI working with you?

A. Yes.

MR. MELLINGER: Your Honor, at this time I would like to move Government's Exhibits 5 and 6 into evidence, the Advice of Rights Form.

MR. BIRMINGHAM: I haven't seen it.

(Government's Exhibits 5 and 6 handed to Mr. Birmingham.)

MR. BIRMINGHAM: Your Honor, I object. I think it is totally self-serving, hearsay statement.

THE COURT: I will overrule the objection. They may be received in evidence.

(Government's Exhibits 5 and 6 marked in evidence.)

MR. MELLINGER: I have no more questions of this witness.

THE COURT: You may cross-examine.

CROSS EXAMINATION:

BY MR. BIRMINGHAM:

Q. Mr. Skinner, when you first spoke with Annette Petty, was it the 2nd or 3rd of October, would you say?

A. October 1st -- not October 3rd.

Q I misunderstood. When you first spoke with her on the 1st, I take it that you had asked her questions to try to develop the pertinent information as fully as you could, did you not?

A Yes, sir.

Q And do that end, I take it, that you asked her specifically who rode in the car down to Erie, Pennsylvania, did you not, sir?

A Yes, sir.

Q So on that day that she told you that it was herself, Michelle and Charles, I assume that you asked her if there was anyone else?

A Yes, sir.

Q And she said, "no"?

A Right.

Q Then on the 7th of October she added this fellow "James," is that correct?

A Yes, sir.

Q You gave her an Advice of Rights Form on each occasion that you spoke to her, but, in fact, it is not a Federal crime for a girl to cross State lines for the purpose of prostituting herself, is it?

A Not on the White Slave Traffic Act.

Q You made it reasonably clear to Miss Petty, I take it, that what you wanted her for was to be a witness?

A Yes.

Q I take it that you explained to her that if she cooperated with the Government and was a witness for the Government that the Government, in turn, would do those things for Miss Petty that it was in its power to do?

A I told her that I would make it known to the U. S. Attorney's Office.

Q In fact, she wasn't in any trouble with the U. S. Attorney to begin with, was she?

A Right.

Q And did you talk to any juvenile authorities or anyone else to tell them, in fact, that she was cooperating?

A No, sir.

Q You didn't tell them?

A No, sir.

Q I take it that you did make it clear that she wasn't in any trouble with you as far as any Federal violations were concerned?

A Yes, sir.

Q Now you said that at the end of the statement that she gave on the 7th she wrote in her own handwriting words to the effect that she had read the statement and that she initialed the corrections and that it was true?

A Yes, sir.

Q Now the language that was used there, I take it, sir, was

your language, standard procedure for the Federal Bureau  
of Investigation, is it not, sir?

A. It is my own procedure.

Q. At least in this statement of Michelle Sims, which is  
Exhibit 33, she ends her statement in a remarkably similar  
way, does she not?

A. Yes, sir.

Q. And this is a statement in which Michelle Sims says that  
it was Willie Littleton that brought them down to Erie,  
Pennsylvania, is it not?

A. Yes, sir.

Q. It is fairly obvious, then, I take it, simply because a  
person says the statement is true and writes on the bottom  
of the form, that in and of itself doesn't make it true,  
does it?

A. Yes, you are right there.

Q. I take it, Mr. Skinner, that you were not in Erie, Pennsylvania,  
on September 19th or September 20th of 1976, and  
certainly have no personal knowledge of whatever went on  
down there?

A. Are you referring to '76 or '74?

MR. BIRMINGHAM: I'm sorry. I  
misspoke. I mean 1974.

THE COURT: If he was down there,  
it would have been brought out. Let's go

on to something else. He wasn't there.

Q. I take it you have no basis yourself for knowing of what motives, if any, Annette Petty might have to lie about Charles White, do you?

MR. MELLINGER: I will object to the question.

THE COURT: Sustained.

Q. Do you know, sir, whether or not Annette Petty knew Willie Littleton?

MR. MELLINGER: I will object to the relevance of that, Your Honor.

THE COURT: He is being asked whether she knows. I will permit him to be asked whether Annette Petty knew Willie Littleton. But if you are asking whether he knows of his own knowledge, I don't know how he would know that unless he saw the two of them together.

THE WITNESS: Antoinette did not tell me she knew Willie Littleton.

THE COURT: When you say "Antoinette," you are talking about Annette Petty?

MR. BIRMINGHAM: That is all.

THE COURT: Any redirect examination?

MR. MELLINGER: None, Your Honor.

(Witness excused.)

MR. MELLINGER: Your Honor, at this time I request Government's Exhibits 1, 2, 3, 4, 5 and 6, which are in evidence, be allowed to be stipulated to the jury.

MR. BERMINGHAM: They are in evidence. I suppose the jury can see it.

THE COURT: May I see them first, please?

MR. MELLINGER: Yes, Your Honor.

(Government's Exhibits 1 through 6 handed to the Court.)

THE COURT: You may do so.  
(Government's Exhibits 1 through 6 handed to the jury.)

MR. MELLINGER: At this point the Government will rest, Your Honor.

THE COURT: Will counsel approach the side bar, please.

(At the side bar.)

MR. BERMINGHAM: I asked Mr. Mellinger if he would make available to

## CHARGE OF THE COURT

THE COURT: Members of the jury, we are now at that stage in the trial where you will soon undertake your final function as jurors. Here you are to perform one of the most sacred obligations of citizenship, and that is acting as ministers of justice.

You are to discharge this final duty in an attitude of complete impartiality, and as I emphasized when you were first selected without bias or prejudice, for or against the Government or the defendant as parties to this controversy.

Let me state that the fact that the Government is a party here entitles it to no greater consideration than accorded to any other party in court.

By the same token, it is entitled to no less consideration. All parties, individuals, and Government alike stand as equals before the bar of justice.

Your final role here is to decide and pass upon the fact issues in the case. You are the sole and exclusive judges of the fact. You determine the weight of the evidence. You will appraise the credibility or truthfulness of the witnesses. You draw the reasonable inferences from the evidence, or conclusions, from the evidence, and you resolve such conflicts as there may

be in the evidence.

My final function here is to instruct you as to the law, and it is your duty to accept those instructions as to the law and to apply them to the facts as you may find them.

You are not to consider any one instruction which I give you alone as stating the law, but you must consider all of my instructions, taken together as a whole.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that the lawyers, either for the Government or the defendant, may have said with respect to matters in evidence, whether during the trial, in a question, in argument, or in summations, is not to be substituted for your own recollection of the evidence.

So, too, anything that I might say during the trial, or anything I might refer to during the course of these instructions as to any matter in evidence, is not to be taken in lieu of your own recollection.

It is not my function to favor one side or the other, or to indicate to you, the jury, in any way that I have any opinion as to the credibility or truthfulness of any witness, or as to the guilt or innocence of the defendant. That is your function, yours alone, and I leave it entirely to you.

So please do not assume that I hold any opinion in any matters concerning this case, and please don't reach any conclusion that I may have some attitude or that I may tend to favor one side or the other in the case. I do not.

Of course, the Indictment here itself is not evidence of the crime charged. Instead, an Indictment is merely the method or procedure under the law whereby persons accused of crimes by a Grand Jury are brought into court to have their case decided by a trial jury such as yourselves.

Therefore, the Indictment must be given no evidentiary value, but shall be treated by you only as an accusation. It is not evidence or proof of the defendant's guilt, and no weight or significance whatever is to be given to the fact that an Indictment has been returned against the defendant. He has pleaded not guilty, and thus, the Government has the burden of proving the charge beyond a reasonable doubt.

The defendant does not have to prove his innocence. On the contrary, he is presumed to be innocent of the accusation contained in the Indictment. This presumption of innocence was in his favor at the start of the trial, as I believe I told you before.

It continued in his favor throughout the entire

trial, and it is in his favor now, and remains in his favor during the course of your deliberations in the jury room, and the presumption of innocence is removed only if and when you, the jury, are satisfied that the Government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt.

Of course, unless you are so convinced, you must find him not guilty.

Now, the question naturally comes up, what is a reasonable doubt? Well, members of the jury, those words almost define themselves, that is, a doubt founded on reason arising out of the evidence in the case, or the lack of evidence.

It is a doubt which a reasonable person has after carefully weighing all the evidence. A "reasonable doubt" is a doubt that appeals to your reason, to your judgment, to your common sense and your experience. It is not caprice or whim or speculation or conjecture or suspicion -- it is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for the defendant.

If after a fair and impartial consideration of all the evidence, you can candidly and honestly say you are not satisfied of the guilt of the defendant, that you do not have an abiding conviction of the defendant's

Guilt of the particular charge, in sum, if you have such a doubt which would cause you as prudent persons to hesitate before acting in matters of importance to yourselves, then you have a reasonable doubt, and in that circumstance, it is your duty to acquit the defendant.

On the other hand, if after such an impartial and fair consideration of all the evidence you can candidly and honestly say you do have an abiding conviction of a defendant's guilt, such a conviction as you would be willing to act upon in important and weighty matters of the personal affairs of your own life, then you have no reasonable doubt, and under those circumstances, it is your duty to convict.

"Reasonable doubt" doesn't mean a positive certainty or beyond all possible doubt. If that were the rule, few men, however guilty they might be, would never be convicted, because it is practically impossible for a person to be absolutely and completely convinced of any disputed fact which by its nature is not susceptible to mathematical certainty. For that reason the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt -- not beyond all possible doubt.

For your guidance in considering the evidence you have heard, I must tell you there are two classes of

evidence recognized and admitted in courts of justice upon either of which the jurors may find an accused person guilty of a crime. One is called direct evidence and the other is called circumstantial evidence.

Direct evidence tends to show the fact in issue without any need for any other amplification, although, of course, there is always the question whether it is to be believed.

Circumstantial evidence tends to show facts from which the fact in issue may reasonably be inferred. It is evidence that tends to prove the fact in issue by proof of other facts which have a legitimate tendency to lead the mind to infer or conclude that the facts sought to be established must be true.

There is a traditional example which is given, a simple one, which is given of the use of circumstantial evidence. Let's assume for a moment that you were in an office down the street in one of those higher buildings that are down there that have windows that look out on the street below, and let's assume it is a cloudy day and sometimes it is difficult merely by looking out of a window of a tall building to determine whether it's raining or not. But if you look out of the window down on the street you see people passing by in the street have their umbrellas up and you will usually come to the con-

clusion that it must be raining. You have direct evidence, the evidence of your own senses that tells you the umbrellas are up. You can see them, and that evidence constitutes circumstantial evidence from which you are entitled to draw the inference, or reach the conclusion, that it must be raining.

In other words, circumstantial evidence consists of facts proved from which the jury may infer by a process of reasoning other facts which may be in dispute, and circumstantial evidence, if believed, is of no less value than direct evidence, for in either case you must be convinced beyond a reasonable doubt of the guilt of the defendant before he may be convicted of any crime.

Now, in determining what evidence you will accept, you must make your own evaluation of the testimony given by each of the witnesses, and determine what you believe to be the truth and decide the degree of weight to which you choose to give that testimony. The testimony of a witness may fail to conform to the facts as they occurred, because the witness didn't actually see or hear what he or she testified about, or because he or she is intentionally telling a falsehood, or because his or her recollection of the events, his or her memory is faulty, or because he or she hasn't expressed himself or herself clearly in giving testimony. There is

no magic formula by which you can evaluate testimony. 179

You bring to the courtroom all of the everyday experiences and background of your own lives. In your everyday affairs, each of you determine for yourselves the reliability of statements made to you by other people and the same tests you use in your everyday dealings and everyday lives are the tests that you will apply in your jury deliberations.

You may, of course, consider the interest, or lack of interest, of any witnesses in the outcome of this case. A witness who is interested in the outcome of this case is not necessarily unworthy of belief, but the interest of a witness is a factor or a possible motive which you may consider in determining the weight and credibility to be given his testimony, and in doing this, you may also consider whether the testimony of a witness is corroborated or borne out by the testimony of others, or by documentary exhibits or evidence.

You may consider the bias or prejudice of a witness if there be any, and the manner in which the witness gives his or her testimony on the stand, the appearance and conduct of the witness, the opportunity the witness had to observe the facts that he or she has testified about, and the probability or improbability of the testimony in the light of all of the other events in the trial.

You may consider whether or not a witness had a motive to lie. These are all items to be taken into your consideration in determining the truthfulness and the weight, if any, you will assign to that witness' testimony. If your discussions suggest there was a discrepancy in the testimony, you will have to consider whether this can be reconciled by fitting the conflicting testimony together, and if that is not possible, you will have to determine which of the conflicting versions you will accept, if any.

Now, if a witness has shown to have knowingly testified falsely concerning any material matter in the trial, or at a prior proceeding in the Grand Jury, you have a right to distrust such witness' testimony in other things, and you may reject all of the testimony of that witness, or you may give it, or parts of it, such credence as you think it deserves.

In every criminal trial, there is a rule of law which every defendant has the privilege and right to rely upon. It is the rule that no defendant is compelled to take the witness stand himself or offer any evidence. By pleading not guilty, the defendant has, in effect, denied the charge in which he is being tried, and he has placed in issue before you every material fact in the case. It is the Government which must prove him guilty beyond a

reasonable doubt, and he cannot be required to testify or disprove anything. An accused person has the right to stand mute, and the fact that he did not take the stand in his own defense may not be considered by you as any indication of guilt or as any basis for any inference adverse to him in any way whatsoever. That is a very important rule, and you are charged that in your discussions, you shall not have any consideration of his failure to take the stand, or even any discussion of it.

Now, before I conclude my preliminary remarks, and read you the Indictment, I wish to mention two additional cautionary instructions. The first of these concerns the testimony received at this trial of Special Agent Lester S. Skinner of the Federal Bureau of Investigation, as to two statements or interviews made to him by Miss Annette Petty in October of 1974. Those statements are hearsay and ordinarily not permitted in a court of law. In this trial, this testimony was admitted under an exception of this rule, principally because Annette Petty is since deceased, and therefore unavailable to testify here in person and be cross-examined and be observed by you on the stand like the other witnesses in this trial. For that reason, this evidence is to be treated carefully by you and weighed with caution. Whether it is entitled to any weight is, like all fact

issues in the case, a question solely for your decision. You use your common sense in considering all the relevant circumstances. I am sure there are a number of questions you will want to ask yourselves in considering whether Annette Petty told the truth to the FBI on the occasion of these interviews. "Was she cognizant of the seriousness of the situation and the importance of the interviews and motivated to telling the truth at that time?"

"Did she consider that by admitting that she had engaged in prostitution, or that she went to Erie to do so, was knowingly and intentionally making an admission against her penal interest, one that could get her committed as a delinquent minor?"

If so, you may, but you need not regard that as circumstantial evidence of trustworthiness.

"Did she regard the signing of the waiver of rights forms, or the fact that it was the FBI that was questioning her, or both, as sufficiently serious to guarantee trustworthiness?"

"Is the statement borne out in sufficient detail by other testimony, or records, or evidence, that you do believe, so that the statement of Miss Petty has intrinsic circumstantial guaranties of trustworthiness?"

Putting these questions to you is not to suggest the answers. That is for you, the jury, to do. And your

own thinking will probably suggest to you other questions. But I caution you most strongly that unless you regard Miss Petty's statements to the FBI which Agent Skinner testified to about as truthfully and accurately recorded by Skinner, and also truthfully and accurately told to him by the deceased, and as possessing circumstantial guaranties of trustworthiness, then they are entitled to no weight whatsoever in your deliberations, and may not be relied upon unless you so find them as possessing such guaranties of trustworthiness. Here, again, the weight, meaning the significance of evidence, is a matter, like all the factual decisions in this case, is one just for you, the jurors, and you alone to decide.

Also, I wish to caution you with respect to the testimony of Miss Michelle Sims who was called by the Government as a witness. She and Miss Petty are self-admitted prostitutes and are, or may be accomplices in the crime charged here.

Now in the prosecution of crime, the Government is frequently called upon to use accomplices as witnesses, or use their statements in evidence, persons who say they were accomplices. Often it has no choice because the Government must rely upon such witnesses to transactions as there may be.

It is not frequent that outsiders, or non-

participants are witnesses to criminal activities. The Government frequently must use such "accomplice testimony" because otherwise it would be difficult or impossible to detect or prosecute wrongdoers.

There is no requirement in the Federal Court that the testimony of an accomplice be corroborated. The Government contends in this case that the testimony is corroborated. That is a factual issue. It is for your consideration.

A conviction may rest upon the uncorroborated testimony of an accomplice if you believe him and find it credible, but the fact that a witness may be an accomplice should be considered by you as bearing adversely upon her credibility and doesn't follow that just because a person has knowledge and participation in the same crime charged, she is not capable of giving a truthful version of what happened. However, Miss Sims' testimony and Miss Petty's statement should be viewed with great caution and scrutinized carefully because of the fact that they are or may be accomplices.

Now I will read the Indictment:

"The Grand Jury Charges: On or about the 19th day of September, 1974, Charles Edward White knowingly did transport in interstate commerce, from Buffalo, New York, in the Western District of New York, to Erie,

Pennsylvania, two girls, that is, Annette Petty and Michelle Sims, for the purposes of prostitution, debauchery and other immoral purposes, in violation of Title 18, United States Code, Section 2421."

That is the Indictment.

Now the defendant, Mr. Charles Edward White, is charged with violating Section 2421 of Title 18 of the United States Code, which reads in relevant part as follows:

"Whoever knowingly transports in interstate commerce -- any woman or girl for the purpose of prostitution -- shall be guilty of an offense against the laws of the United States."

Members of the jury, you don't have to keep the section number in mind, but it is essential that you understand what conduct the statute forbids.

In order to convict the defendant, Charles Edward White, the Government must prove to your satisfaction beyond a reasonable doubt, each of the following three elements of the crime charged. Unless each such element is so proved to you beyond a reasonable doubt, you must find the defendant "not guilty."

These are the three elements: Please pay careful attention...

First Element: That the defendant transported

a woman or girl, in interstate commerce, at or about the date or time, and between the places charged in the Indictment.

Second Element: That he did so knowingly and willfully.

Third Element: That he did so for the purpose of prostitution.

You don't have to give consideration to the words "debauchery and other immoral purposes" appearing in the Indictment. There is no evidence here in his case, and the Government is resting its contention solely on the contention that prostitution was the purpose.

Now I will discuss each of these elements separately.

With respect to the first element, I instruct you that a woman or a girl is transported in interstate commerce whenever she moves or travels across State lines from one State into another State. If the defendant carried or caused to be carried Miss Michelle Sims or Miss Annette Petty, or either or both of them, from Buffalo, New York, to Erie, Pennsylvania, on or about the date set forth in the Indictment, and did so by means of the Thruway in the private automobile said to belong to Texas White, this would satisfy the first element.

The second element requires you to determine

whether the defendant acted knowingly and willfully in doing so. And these are important words.

The question is what do these words mean?

First, let me instruct you what they don't mean. They do not mean that the Government must show that the defendant knew he was breaking a particular law before he can be convicted of a crime. They do not mean that the Government has to show that the defendant intended to profit at the expense of any other person, nor do they have anything to do with his personal or private reasons for violating the statute. For if, after considering all the evidence in accordance with my instructions to you, you come to the conclusion that the defendant violated the statute, then in that event the defendant's personal or private reasons for violating the statute are of no consequence as far as his guilt is concerned.

I instruct you that these words "knowingly and willfully" mean deliberately, intentionally. In other words, you must be satisfied beyond a reasonable doubt that the defendant acted with knowledge, consciously and in the free exercise of his will. The words "knowingly and willfully" are opposed to the idea of an inadvertent or accidental occurrence.

An act is done knowingly if it is done voluntarily and purposely and not because of mistake, accident,

negligence or other innocent reason.

An act is done willfully if it is done knowingly and purposefully and not because of mistake. "Willful" doesn't mean that the defendant, in addition to knowing what he was doing, must also suppose he was breaking any particular law. Rather, it is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his act.

As for the third element, it is essential that the transportation interstate have for its dominant object in Mr. White's mind, at the time, or be the means then intended by Mr. White, of effecting or facilitating the prostitution of Michelle Sims or Annette Petty, or either or both of them at Erie, Pennsylvania.

An intention that one or both of these women shall engage in prostitution on their arrival at Erie, Pennsylvania, must be found to exist before the conclusion of the interstate journey, and must be the dominant motive for such interstate transportation. Otherwise, he must be found not guilty. Here, I am talking about the intention of Mr. White. The purpose or intention of the two women is relevant only insofar as it sheds light on the intention of Mr. White, and was known to him before the journey ended.

You may not find the defendant guilty simply

because you determine that he caused the women to be transported across the State line and that thereafter one of them engaged in prostitution after she was so transported, unless you also find beyond reasonable doubt that before the conclusion of the transportation, the defendant formed the intent to transport one or both so that she or both could engage in prostitution at Erie, Pennsylvania, and effected such transportation for that purpose. However, it is not an essential element of the crime that the Government prove the defendant expected or anticipated pecuniary gain from the transportation, or from any prostitution by the women after their arrival there.

It is sufficient if, at the time of transporting, he had the intention to facilitate their prostitution in Erie, Pennsylvania, and to make that something which he wished to succeed.

It is also not necessary that the Government prove the defendant forced the girls to travel, or forced them to engage in prostitution or even that he persuaded the girls to engage in prostitution. But the Government must prove beyond a reasonable doubt that at the time the defendant transported the women, he knew that they intended, or at least one of them intended, to engage in prostitution upon their arrival, and that his dominant

purpose in so transporting them, if he did so, was to facilitate their intention to so engage in prostitution in Erie, Pennsylvania.

The offense charged in the Indictment is complete, once a woman is knowingly and willfully transported or caused to be transported across the State line for the purpose of prostitution as alleged.

As to Annette Petty, it is of no consequence whether she did, in fact, engage in prostitution after her arrival. If, however, the evidence shows that prostitution was, in fact, engaged in by Michelle Sims after her arrival, that fact may be considered by the jury for such light, if any, as it may shed upon the purpose of the trip at the time the transportation occurred.

Now, members of the jury, intent ordinarily may not be proved directly, but you may infer the defendant's intent from all the facts and circumstances in the case which indicate to you what his state of mind was at the time, and using your common sense, reach a conclusion based on all that the evidence which you believe shows what he said or did at the time in question. That is a matter for your decision based on all factors in the case.

I am almost finished, and I would like to say

a word to you about deliberating. Your first step is to select and agree upon a person to act as a foreman or forelady of the jury. And I want to say to you that the opinion of your spokesman so selected is no more important or significant in deliberations than that of any other juror. Each juror has to decide the case for himself or herself. And each juror is entitled to his or her own opinion. And you should exchange views in your discussion with other jurors. That is the very purpose of jury deliberations, to discuss and consider the evidence; to listen to the arguments of fellow jurors; to present your individual views, and to consult with one another politely and reasonably; and to reach a fair and just verdict together, based solely and wholly on the evidence, if you can do so without violence to your own individual judgment. However, as I said, each of you must decide the case for himself or herself. After this discussion, you shouldn't hesitate to change an opinion which you may hold, which after discussion appears wrong to you in the light of discussion viewed against the evidence and the law. However, if after carefully weighing all the evidence and listening carefully to arguments of your fellow jurors, any one of you entertains a conscientious view that differs from the others, you are not to yield your judgment and give up simply because you are outnumbered or

outweighed. Your final verdict must reflect individual conscientious judgment of each juror as to how this case should be decided. In order to reach a verdict it must be unanimous.

Now under your oath as jurors, you cannot allow a consideration of the possible sentence or punishment which might be inflicted upon the defendant if convicted to influence your verdict in any way or in any sense enter into your deliberations.

The duty of imposing sentence rests exclusively upon the Court. Your function is to weigh the evidence in the case and to determine whether or not the defendant was proved guilty beyond a reasonable doubt, and to do so solely upon the basis of the evidence and the law.

You are to decide the case upon the evidence and the evidence alone, and you mustn't be influenced by any assumption, conjecture or sympathy, or by any inference not warranted by the facts.

If you fail to find beyond a reasonable doubt that the law has been violated, you should not hesitate for any reason to find a verdict of not guilty. But on the other hand, if you should find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

Now, the exhibits will be delivered to you, and

It may be in the course of your deliberations, you may want to have some part of the testimony read to you, or you may find that you are uncertain as to the meaning of some part of my instructions. In that case, the foreman will send out a note asking for whatever will clear up any question you may have. In communicating by note, please don't tell the Court how your vote may then be divided. I don't want to hear how your vote stands. And also, please exhaust ~~your~~ own collective recollection by discuss . before you ask for anything to be read. If you do ask f r something to be read, try to be precise about what it is you want. I am perfectly willing to do it, but don't ask for it unless the jury really believes that they require it.

If you need a copy of the Indictment for your consideration, send out a note and ask for that, and that will be sent in to you, but as I mentioned to you earlier, an Indictment is merely an accusation, and it has no status as evidence.

Now just a few closing words. Your oath sums up your duty, and that is without fear or favor to anyone, you will well and truly try the issues between this defendant and the Government of the United States, based solely on the evidence and the Court's instructions as to the law, and a fair verdict give.

It is important to the defendant -- it is important to the Government, and it is important to you.

Now at this time it turns out that the alternate jurors will not be required. I appreciate your attendance here, and it turns out that we don't need you because we have twelve jurors. Sometimes illness or one thing or another reduces our jury, so the two alternate jurors are now excused. Before you leave, I want to ask you please don't discuss the case until the jury has finished its work. Don't speak to any of the attorneys or the parties or anybody else about the case until the case is over. That might not be today. You may now withdraw from the courtroom.

(Two alternate jurors excused.)

(Two marshals were duly sworn.)

THE COURT: At this time, members of the jury, I will ask you to remain seated in the box for a few moments longer while I confer in the next room with the attorneys to see if there are any additional instructions which I should have mentioned to you, or anything that I may not have covered.

Now during this time I ask you not to discuss the case while you are seated in the box, because there is the possibility that I might find it proper to give you additional instructions which you have not yet

Please remain seated here in the custody of the marshals, and don't talk with each other, and I will join you in just a few minutes.

(In the robing room.)

THE COURT: Does the Government have any additional requests?

MR. KELLINGER: No requests and no exceptions, Your Honor.

MR. BERMINGHAM: I have nothing additional, Your Honor, to what I have already said at the charge conference.

THE COURT: Do you have any additional exceptions other than what you told me?

MR. BERMINGHAM: No, sir.

THE COURT: Very well, gentlemen. Thank you.

(In open court.)

THE COURT: One last word, members of the jury. When you go to lunch, don't discuss the case in a public restaurant. All of your deliberations should be conducted only in the jury deliberating room and only when all the jurors can participate equally in the deliberations. Every juror should be present and participating at all times when the jury is discussing the case.

Now would you please withdraw and commence your deliberations.

United States of America vs.

CHARLES EDWARD WHITE  
WESTERN DISTRICT OF NEW YORK  
DOCKET NO. Cr-74-270

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government  
the defendant appeared in person on this date

MONTH DAY YEAR  
October 28 1976

COUNSEL  WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.  
 WITH COUNSEL Joseph D. Birmingham, Jr. (Name of counsel)

PLEA  GUILTY, and the court being satisfied that there is a factual basis for the plea,  NOLO CONTENDERE,  NOT GUILTY

FINDING & JUDGMENT There being a ~~Rating~~/verdict of  NOT GUILTY. Defendant is discharged  
 GUILTY.

Defendant has been convicted as charged of the offense(s) of Interstate transportation of females for the purposes of prostitution, debauchery and other immoral purposes (Ct. 1), in violation of Title 18, U.S.C., Section 2421

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three and One-Half (3½) Years.

SENTENCE OR PROBATION ORDER

FILED

OCT 28 1976

...O'C.....M.

K. ADAMS, Clerk

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY  
 U.S. District Judge

U.S. Magistrate

Charles L. Brieant Jr. (Signature)  
CHARLES L. BRIEANT, JR., U.S. DISTRICT JUDGE  
Date October 28, 1976

19

In the UNITED STATES COURT OF APPEALS  
For the Second Circuit

UNITED STATES OF AMERICA,  
Appellee

-vs-

AFFIDAVIT  
Docket No. 76-1511

CHARLES EDWARD WHITE,  
Appellant

STATE OF NEW YORK )  
COUNTY OF ERIE ) ss:  
CITY OF BUFFALO )

JOSEPH D. BIRMINGHAM, JR., being duly sworn, deposes  
and says:

1. He is the assigned attorney for the appellant.
2. He served two (2) copies of the Appellant's Brief and Appendix upon the United States Attorney for the Western District of New York, attorney for the appellee, by delivering them to his office at the United States Courthouse, Buffalo, New York, on February 3, 1977.
3. The reason why these briefs were served upon the United States Attorney and mailed to the Court on February 3, 1977, instead of January 28, 1977, as ordered, is that timely service was made impossible by the snow emergency existing in Buffalo, New York, from January 28, 1977 to the present. The typing and copying of the Appellant's Brief and Appendix was completed January 27, 1977. The copies were then sent by the copier to another location for binding. In the normal course, they would have been available for mailing by noon, January 28, 1977. Prior to noon, the entire Western New York region was struck by a snowstorm of such ferocity that it was impossible to recover